TRANSCRIPT

OF

RECORD

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted]292

SALVATORE L. ROCCA, PLAINTIFF IN ERROR

vs.

GEORGE F. THOMPSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MAY 16, 1910.

(22,182.)

(22,182.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 561.

SALVATORE L. ROCCA, PLAINTIFF IN ERROR,

vs.

GEORGE F. THOMPSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 3, 1910

1 Copy.

In the Supreme Court of the State of California.

In the Matter of the Estate of GIUSEPPE GHIO, Deceased.

SALVATORE L. ROCCA, Appellant,
vs.
GEORGE F. THOMPSON, Respondent.

Petition for Writ of Error.

To the Honorable W. H. Beatty, Chief Justice of the Supreme Court of the State of California:

The petition of Salvatore L. Rocca respectfully shows:

That heretofore, to-wit on the 5th day of April, 1910, the Supreme Court of the State of California, made and entered its judgment in the above entitled matter affirming the order of the Superior Court of the County of San Joaquin appealed from herein; that more than thirty days have elapsed since the said judgment was so made and entered herein and the same has now become final;

That this is an appeal from an order of the Superior Court of the County of San Joaquin, State of California, denying the petition of appellant herein as Consul-General of the Kingdom of Italy for letters of administration upon the estate of Giuseppe Ghio, a deceased citizen of the said Kingdom of Italy, who died leaving estate within said County, and granting the petition of George F. Thompson for letters of administration of said estate;

That in and by this proceeding your petitioner specially set up and claimed the right to such letters of administration under the treaty between the United States and Italy known as the Consular Convention of 1878; and the said decision of said Supreme Court was against the said right so specially set up and claimed under said treaty.

2 That your petitioner was and is aggrieved by said decision in that certain errors were committed herein by said Superior Court and by said Supreme Court, to the prejudice of your petitioner as will more fully appear from the assignment of errors filed herewith.

Wherefore, said appellant prays that a writ of error may issue to the Supreme Court of the State of California for the correcting of the errors complained of and that a duly authenticated transcript of the record, proceedings and papers herein, may be sent to the United States Supreme Court.

SALVATORE L. ROCCA, *Petitioner.*

AMBROSE GHERINI,
Attorney for Petitioner.

3 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Salvatore L. Rocca being duly sworn, deposes and says:
I am the petitioner herein. The foregoing petition is true to my own knowledge except as to matters therein stated to be alleged upon information and belief; and as to those matters, I believe the same to be true.

SALVATORE L. ROCCA.

Subscribed and sworn to before me this 6th day of May, 1910.
[SEAL.] CHAS. F. DUSENBERG,
Notary Public in and for the City and County of San Francisco, State of California.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Original petition for Writ of Error filed May 9, 1910 as shown by the records of my office.
Witness my hand and the seal of the Court, this 10th day of May, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

[Endorsed:] #1669. Petition for Writ of Error.

4 Copy.

In the Supreme Court of the State of California.

SALVATORE L. ROCCA, Plaintiff in Error,
against
GEORGE F. THOMPSON, Defendant in Error.

Order Allowing Writ.

Comes now Salvatore L. Rocca, the Appellant above named on this 6th day of May, 1910, and files and presents to this Court his petition, praying for the allowance of a writ of error intended to be urged by him; and praying further that a duly authenticated transcript of the records, proceedings, and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States, the questions therein presented, it is ordered by this court that a writ of error be allowed, as prayed; provided, however, that said appellant, give bond according to law in the sum of one thousand Dollars which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 6th day of May, 1910.

W. H. BEATTY,
Chief Justice of the Supreme Court
of the State of California.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original allowance of Writ of Error filed May 9, 1910 as shown by the records of my office.

Witness my hand and the seal of the Court, this 10th day of May, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

[Endorsed:] #1669. Allowance of Writ of Error.

5 In the Supreme Court of the United States.

SALVATORE L. ROCCA, Plaintiff in Error,
vs.
GEORGE F. THOMPSON, Defendant in Error.

Assignment of Errors.

Now comes Salvatore L. Rocca, plaintiff in error, and makes and files this his assignment of errors:

I.

The Supreme Court of the State of California erred in deciding that the Consular Treaty of 1878 between the United States and the Kingdom of Italy does not give to the Consul General of the Kingdom of Italy in and for the State of California, the right to administer the estates of deceased citizens of the Kingdom of Italy situated within said State.

II.

The said Supreme Court of the State of California erred in deciding that Article IX of the Treaty of 1853 between the United States and the Argentine Republic does not give to the Consul-General of the Argentine Republic in and for the State of California, the right to administer the estates of deceased citizens of the Argentine Republic situated within said state.

III.

The said Supreme Court of the State of California erred in affirming the order of the Superior Court of the State of California in and for the County of San Joaquin denying the application of this plaintiff in error as Consul General of the Kingdom of Italy in and for

the State of California for letters of administration of the estate of Giuseppe Ghio, a deceased citizen of the Kingdom of Italy who died intestate leaving estate situated in said County of San Joaquin,
6 State of California.

IV.

That said Superior Court of the State of California in and for the County of San Joaquin, erred in denying the said application of this plaintiff in error.

V.

That said Supreme Court of the State of California erred in affirming the order of the Superior Court of the State of California in and for the County of San Joaquin granting the application of defendant in error herein for letters of administration of said estate.

VI.

The said Superior Court of the State of California in and for the County of San Joaquin erred in granting the said application of defendant in error for letters of administration of said estate.

Dated this 6th day of May, A. D., 1910.

AMBROSE GHERINI,
Attorney for Plaintiff in Error, 460 Montgomery Street, San Francisco, State of California.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Assignment of Errors filed May 9, 1910 as shown by the records of my office.

Witness my hand and the seal of the Court, this 10th day of May, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

[Endorsed:] #1669. Assignment of Errors.

7 The United States Fidelity and Guaranty Company.
Capital Paid in Cash $1,700,000.
Total Resources Over $3,500,000.
Home Office: Baltimore, Md.

In the Supreme Court of the United States.

SALVATORE L. ROCCA, Plaintiff in Error,
against
GEORGE E. THOMPSON, Defendant in Error.

Know all men by these presents: That we, Salvatore L. Rocca, of the City and County of San Francisco, State of California, as principal, and The United States Fidelity and Guaranty Company, a

corporation organized and existing under and by virtue of the Laws of the State of Maryland, and qualified to do business under the Laws of the United States, as surety, are held and firmly bound unto the above named Defendant in Error, George F. Thompson, in the sum of One Thousand and 00/100 Dollars, ($1,000.00), to be paid to him, and for the payment of which, well and truly to be made, we bind ourselves and each of us, our, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of May, 1910.

Whereas, the above named, Salvatore L. Rocca, Plaintiff in Error, seeks to prosecute a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of California;

Now therefore, the condition of this obligation is such, that if the above named Plaintiff in Error shall prosecute his Writ of Error to effect, and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

SALVATORE L. ROCCA. [SEAL.]

[Seal of The United States Fidelity and Guaranty Company, Incorporated 1896.]

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By JESSE W. WHITED, *Attorney in Fact.*
By W. S. ALEXANDER, *Attorney in Fact.*

The above bond is hereby approved.

W. H. BEATTY,
Chief Justice Supreme Court, State of California.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Original Bond filed May 9th, 1910, as shown by the records of my office.

Witness my hand and the seal of the Court, this 10th day of May, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

8 [Endorsed:] #1669. From —— to ——. Bond. The United States Fidelity & Guaranty Co., Baltimore, Md.

9 In the Supreme Court of the United States.

SALVATORE L. ROCCA, Plaintiff in Error,
against.
GEORGE E. THOMPSON, Defendant in Error.

Prayer for Reversal.

To the Honorable the Supreme Court of the United States:

And now comes Salvatore L. Rocca, the plaintiff in error, and prays for a reversal of the judgment of the Supreme Court of the State of California in the matter wherein Salvatore L. Rocca, Consul-General of Italy, was Appellant, and George F. Thompson, Public Administrator, was Respondent, which judgment was entered in the office of the clerk of the Supreme Court of the State of California on or about the 5th day of April, 1910, and he also prays for a reversal of the order granting letters of administration in said matter to defendant in error herein made on the 6th day of July, 1908, and entered on the 11th day of July, 1908, in the Superior Court of the State of California in and for the County of San Joaquin.

AMBROSE GHERINI,
Counsel for Plaintiff in Error, 460 Montgomery Street, San Francisco, State of California.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Original prayer for reversal filed May 9, 1910, as shown by the records of my office.

Witness my hand and the seal of the Court, this 10th day of May, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

10 [Endorsed:] #1669. Prayer for reversal.

11 Copy.

In the Supreme Court of the State of California.

Probate. Sac. No. 1669.

In the Matter of the Estate of GIUSEPPE GHIO, Deceased.

SALVATORE L. ROCCA, Appellant,

—

GEORGE F. THOMPSON, Respondent.

Transcript on Appeal from Order of Superior Court of San Joaquin County Granting Letters of Administration to Respondent and Refusing to Grant Letters of Administration to Appellant.

Honorable Frank H. Smith, Judge.

Ambrose Gherini, Clary & Louttit, R. K. Barrows, Attorneys for Appellant.
John E. Budd, Attorney for Respondent.

Filed this 4th day of August, A. D. 1908.
FRANK L. CAUGHEY, *Clerk.*
By —— GRANT, *Deputy Clerk.*

12 In the Supreme Court of the State of California.

Probate. Sac. No. —.

In the Matter of the Estate of GIUSEPPE GHIO, Deceased.

SALVATORE L. ROCCA, Appellant,

—

GEORGE F. THOMPSON, Respondent.

Transcript on Appeal from Order of Superior Court of San Joaquin County Granting Letters of Administration to Respondent and Refusing to Grant Letters of Administration to Appellant.

Honorable Frank H. Smith, Judge.

13 In the Superior Court of the State of California in and for the County of San Joaquin.

No. 3861, Dep't No. 1.

In the Matter of the Estate of GIUSEPPE GHIO, Deceased.

Order Granting Letters of Administration to Public Administrator and Denying Petition of Salvatore L. Rocca for Letters of Administration.

The petition of George F. Thompson, as Public Administrator of the County of San Joaquin, State of California, praying for letters of

administration of the estate of Giuseppe Ghio, deceased, and the petition of Salvatore Rocca, Consul-General of the Kingdom of Italy, in and for the States of California, Washington, Nevada and the Territory of Alaska, praying for letters of administration of the estate of said deceased, coming on regularly to be heard together, as required by law, due proof having been made to this Court that due and legal notice of the hearing of each of said petitions has been given by the Clerk of this Court, and the Court having heard and duly considered the evidence of the respective parties, both
14 oral and documentary, offered in the said matter, now finds the following facts to be true:

I.

That Giuseppe Ghio died intestate on or about the 27th day of April, 1908, in the County of San Joaquin, State of California, and was a resident of said county and a citizen of the Kingdom of Italy at the time of his death.

II.

That the value and character of the property of the said decedent, consists of cash in bank, amounting in all to the sum of $1062.

III.

That petitioner, Salvatore L. Rocca is the duly appointed, qualified, accredited and acting Consul-General of the Kingdom of Italy, in and for the States of California, Oregon, Washington, Nevada and the Territory of Alaska.

IV.

That the petitioner George F. Thompson is the duly elected, qualified and acting Public Administrator of the County of San Joaquin, State of California.

15 V.

That the names, ages and residences of the heirs of the deceased are as follows: Maria Ghio, aged about thirty-five years, and residing in the Town of Desconnesia, in the Kingdom of Italy, the wife of said deceased; Genia Ghio, aged thirteen years, and residing with her mother in Italy; Anna Ghio, aged about nine years, and residing with her mother in Italy, and Genio Ghio, aged about five years, and residing with his mother in Italy. All of the said children are the children of the deceased and Maria Ghio.

VI.

That the deceased died intestate, not leaving any will.

As conclusions from the foregoing findings of fact, the Court finds:

First. That the petition of the Consul-General for letters of administration herein should be denied.

Second. That the petition of the Public Administrator for letters of administration herein should be granted and that letters of administration should be issued to him.

Third. It is, therefore, ordered, adjudged and decreed, that the petition of the Consul-General Salvatore L. Rocca for letters
16 of administration herein be, and the same is hereby denied, and that the petition of George F. Thompson, as Public Administrator of the County of San Joaquin, be, and the same is hereby granted.

And it is further ordered that letters of administration in said estate be issued to him upon his taking the oath of office.

It is further ordered that the usual notice to creditors in said estate be given.

Done in open Court this 6th day of July, 1908.

FRANK H. SMITH,
Judge of the Superior Court.

(Endorsed:) Filed July 10, 1908. Eugene D. Graham, Clerk, by E. W. Barnhard, Deputy Clerk.

(Duly entered July 11th, 1908, in Book "O" of Probate Records, Dep't No. 1, Page 782.)

17 [Title of Court and Cause.]

Notice of Appeal.

To the Clerk of the Above Entitled Court and to George F. Thompson and to Budd & Thompson, John E. Budd, Esq., and E. R. Thompson, Esq., His Attorneys:

Please take notice: That Salvatore L. Rocca hereby appeals to the Supreme Court of the State of California from the order heretofore given, made and entered in the above entitled matter, which said order granted letters of administration of the said estate to George F. Thompson and refused to grant letters of administration of said estate to said Salvatore L. Rocca.

Dated July 9, 1908.

AMBROSE GHERINI,
CLARY & LOUTTIT,
Attorneys for Appellant.

Due service of the within Notice is hereby admitted this 11th day of July, 1908.

JOHN E. BUDD,
Attorney for George F. Thompson.

(Endorsed:) Filed July 11, 1908. Eugene D. Graham, Clerk, by F. H. Johnson, Deputy Clerk.

18 *Stipulation to Transcript.*

It is hereby stipulated and agreed that the foregoing transcript on appeal is correct; that it contains true and correct copies of all the papers and orders set forth now on file or of record in the office of the County Clerk of the County of San Joaquin, State of California, and that the foregoing papers and documents constitute the transcript on appeal herein.

It is further stipulated and agreed, and we hereby certify, that a good and sufficient undertaking on the appeal from the order herein granting letters of administration to respondent, and refusing to grant letters of administration to appellant herein, in due form of law has been properly filed in said cause in the manner and within the time prescribed by law.

Dated, August —, 1908.

JOHN E. BUDD,
Attorney for Respondent.
AMBROSE GHERINI,
CLARY & LOUTTIT,
R. K. BARROWS,
Attorneys for Appellant.

19 *Clerk's Certificate to Transcript.*

I, Eugene D. Graham, County Clerk of the County of San Joaquin, State of California, and ex-officio Clerk of the Superior Court in and for said county, hereby certify that I have compared the foregoing transcript with the original papers in said action, now on file in my office, and with the orders therein made and entered on the minutes of said Court, and that the papers and orders therein contained are full, true and correct copies of the originals on file in this office, and of the whole thereof.

I further certify that a sufficient undertaking on appeal in due form of law, was properly filed in said cause, in the manner and within the time required by law, and that the erasures and interlineations appearing in the foregoing transcript were made before certifying hereto.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court this — day of August, 1908.

[SEAL.] EUGENE D. GRAHAM, *Clerk.*
By —— ——, *Deputy Clerk.*

20 I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an original transcript filed August 4th, 1908, as shown by the records of my office.

Witness my hand and the seal of the Court, this 10th day of May, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By I. ERB, *Deputy Clerk.*

21 *In the Matter of the Estate of GIUSEPPE GHIO, Deceased.

SALVATORE L. ROCCA, Appellant,
v.
GEORGE F. THOMPSON, Respondent.

Appeal from the Superior Court of San Joaquin County.

Frank H. Smith, Judge.

For Appellant, Ambrose Gherini, Clary & Loutitt, R. K. Barrows.

For Respondent, Eustace Cullinan, John E. Budd, Cullinan & Hickey, John J. O'Toole, *amici curiæ*.

Salvatore Rocca appeals from an order of the superior court granting to George F. Thompson, as public administrator of San Joaquin county, letters of administration upon the estate of Guiseppe Ghio, deceased, and refusing the application of said appellant for such letters.

The appeal was submitted to the district court of appeal of the third district and decided in favor of the respondent. A rehearing in the supreme court was ordered, because, as treaty rights were involved, it was deemed advisable that the highest state court should consider the matter.

Giuseppe Ghio, at the time of his death, was a resident of San Joaquin county, California, and a citizen of the kingdom of Italy. He left a small estate situated in San Joaquin county. His heirs at law are his wife, Maria, and three minor children. All of them reside in Italy. The appellant is the consul-general of the kingdom of Italy for California, Nevada, Washington and Alaska territory. The deceased died intestate on April 27, 1908, in San Joaquin county.

The sole question for consideration is whether or not where a citizen of Italy, being a resident of California dies intestate, leaving property in this State, and his lawful heirs reside in Italy and are citizens of that country, the consul-general of Italy is entitled to letters of administration upon his estate, in preference to the public administrator of the county of his residence.

The appellant bases his claim to such letters upon the provisions of the treaty of May 8, 1878, between Italy and the United States. The clauses relating to this subject are articles XVI and XVII which are as follows:

"Article XVI. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the

*On hearing after judgment in District Court of Appeal, Third District (8 Cal. App. Dec. 451).

Consul or Consular Agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested."

"Article XVII. The respective Consuls General, Consuls, Vice Consuls and Consular Agents, as likewise the Consular Chancellors, Secretaries, Clerks or Attaches, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation." (20 U. S. Stats. at Large, p. 752.)

Under article XVII, the appellant, as consul-general of Italy, claims the rights which are given to consuls-general of the Argentine republic by the treaty between that country and the United States, concluded July 27, 1853. (10 U. S. Stats. at Large, p. 1001.) The last clause of article IX of that treaty is as follows: "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul-general, or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul, shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." (p. 1009.)

Article VI of the Constitution of the United States declares that "This constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." And section 10, of Article I, further provides that "No state shall enter into any Treaty, Alliance, or Confederation." We will assume that the treaty-making power of the federal government is so far superior to the law-making power of Congress that it would authorize the federal government to control by treaty the power of the states to confer and limit the right of administration of estates and the power of the state courts to appoint administrators, so far as the estates of resident citizens of foreign countries are concerned. (See, on this subject, note to Yeaker v. Yeaker, 81 Am. Dec. 536.) If this is the case, the treaty with the Argentine republic, if construed in accordance with appellant's contention, supersedes, in part, the provisions of our Code of Civil Procedure of California, giving the right of administration of the estates of persons dying intestate to the public administrator, in the absence of resident legal heirs, and gives to the consular agents of that country a paramount right to letters upon the estates of citizens of that country residing here, who die intestate leaving real or personal property in this state and no resident heirs. The favored nation clause of the Italian treaty would give the like right to the appellant, as consul-general of Italy, in the present case.

Similar favored nation clauses are found in the treaties with Austria-Hungary (treaty of 1870, art. 15, 17 U. S. Stats. 331);

Denmark (treaty of 1826, art. 8, 8 U. S. Stats. 342); Japan (treaty of 1894, art. 15, 29 U. S. Stats. 852); Kongo (treaty of 1891, art. 5, 27 U. S. Stats. 929); Korea (treaty of 1882, art. 2, 7 Fed. Stats. Anno. 680); Russia (treaty of 1832, art. 8, 8 U. S. Stats. 448); Spain (treaty of 1902, art. 28, 33 U. S. Stats. 2120); Switzerland (treaty of 1850, art. 7, 7 Fed. Stats. Anno. 842); Tonga (treaty of 1886, art. 11, 25 U. S. Stats. 1442); and Zanzibar (treaty of 1886, art. 2, 25 U. S. Stats. 1439).

Foreign consuls and consular agents are given the same "privileges" as those of the most favored nation by the treaties with Belgium (treaty of 1880, art. 2, 21 U. S. Stats. 777); Costa Rica (treaty of 1851, art. 10, 10 U. S. Stats. 922); France (treaty of 1853, art. 12, 10 U. S. Stats. 999); Germany (treaty of 1871, art. 3, 17 U. S. Stats. 922); Greece (treaty of 1902, art. 2, 33 U. S. Stats. 2123); Honduras (treaty of 1864, art. 10, 15 U. S. Stats. 705); Netherlands (treaty of 1878, art. 3, 21 U. S. Stats. 663); Paraguay (treaty of 1859, art. 12, 12 U. S. Stats. 1097); Persia (treaty of 1856, art. 7, 11 U. S. Stats. 710); Roumania (treaty of 1881, art. 2, 7 Fed. Stats. Anno. 773); and Servia (treaty of 1881, art. 2, 22 U. S. Stats. 968). The treaty of 1903 with China gives Chinese consuls here the same "attributes, privileges and immunities" as those of the most favored nation. (Art. 2, 7 Fed. Stats. Anno. 487.) The consuls from the countries thus given the same "rights," "prerogatives" or "powers," being those embraced in the list first given, could doubtless claim the same rights as those of Italy, with respect to estates of citizens of their respective countries dying here. Perhaps those included in the second list would claim the same right as a "privilege" within the intent of the respective treaties. The treaty of 1887, with Peru, (25 U. S. Stats. 146), which terminated in 1899 by notification from Peru, provided that the consuls of each country, in the absence of heirs or representatives, should, *ex officio* be the executors or administrators of the citizens of their country who died within their consular jurisdiction. The question presented would directly affect the right of administration upon the estates of all citizens of all the above named countries residing in this state, of whom there is doubtless a large number.

It is also of grave importance because its solution in favor of the appellant necessarily ascribes to the federal government the intent, by means of its treaty-making power, to materially abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdiction. It is obvious that such intent is not to be lightly imputed to the federal government, and that it can not be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it.

So far as we are aware, the exact point has not been considered in any of the states except Massachusetts and New York. In New York it has arisen only in the surrogate courts of two of the counties, New York county and Westchester county. The surrogate court of the latter county held that the consul-general of Italy

was entitled to letters of administration upon the estate of a citizen of Italy who died leaving property in that county, in preference to the county treasurer, who, by the state law, was entitled as public administrator, in the absence of heirs and creditors. (In re Fattosini, 67 N. Y. Supp. 1119.) The same court, in a similar case, apparently decided that the Italian consul was entitled, by virtue of his office, to maintain a proceeding in the surrogate court, before any grant of letters of administration, to obtain possession of the effects of the deceased, in order that the consul might administer the same under the direction and control of the court. It does not appear that letters had been granted to the consul. (In re Lobrasciano's Estate, 77 N. Y. Supp. 1040.) The surrogate court of New York county held, in a similar case, that, where the public administrator refused to act and the Italian consul was legally competent under the state law, he would be entitled to letters, under the statutory provision that when in such case the public administrator refused to act, any person legally competent might be appointed. But his right in preference to the public administrator was denied. (In re Logiorator's Estate, 69 N. Y. Supp. 507.) The Massachusetts supreme court decided that, under the most favored nation clause of the treaty with Russia and by referring to the treaty with the Argentine republic, the Russian vice-
22 consul had a right to administer paramount to that of the public administrator, in the case of a citizen of Russia who died in Massachusetts leaving personal property there, his legal heirs being in Russia (McEvoy v. Wyman, 191 Mass. 276.) In a Louisiana case, Lanfear v. Ritchie, 9 La. Ann. 96, the Swedish consul applied for an order that he supersede the duly appointed public administrator in the possession of the estate of a deceased citizen of Sweden, whose heirs were Swedish subjects residing in Sweden. The contention was that this was guaranteed by the treaty with Sweden. The treaty then in force did not contain any favored nation clause, nor purport to give to consuls in either country the right to administer the estates of its deceased citizens. The court denied his application on that ground, and also on the ground that a treaty could not control the state courts. In Aspinwall v. Queen's Proctor, 2 Curteis, 241, the English court held that the United States consul, as such, had no right under the act of Congress of 1792, to administer upon the estate of an American traveler who died while in England leaving property there. The court said that "the Crown is the party to see that the property of any person dying in its dominions goes into proper hands" and that the law of the United States could not be allowed to control, even if it purported to do so.

We do not agree with the supreme court of Massachusetts and the surrogate of Westchester county, New York, in regard to the meaning and effect of the Argentine treaty. They held that the right given thereby "to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country," included the right to be appointed administrator of the estate in place of the person who might be

designated by the laws of the particular state to be such administrator and who had either been previously duly appointed by the local state court, or was applying for such appointment. It appears clear to us from this language that, whatever right was given, it was intended to be a right which should conform to the laws of the country, and that, in view of the well-known complex form of our government, the phrase "laws of the country," so far as the United States is concerned, means the local laws of administration and procedure of the respective states. If the right asserted is necessarily contrary to those laws, it cannot be said to conform to them. Our law declares that in the absence of next of kin entitled to inherit, the public administrator shall take charge of and administer the estate for the benefit of the creditors and heirs. The right claimed under the treaty is that, in such a case, the consul of the country of which the deceased was a citizen shall take charge and administer; a right directly in conflict with our law. The contention of the appellant is that the only effect of the phrase "conformably with the laws of the country" is that the consul, when appointed, must administer the estate in compliance with the local law of administration. The more obvious interpretation is that the phrase qualifies the right and the method of intervention, as well as the procedure after intervention takes place, that is, that if the consul intervenes, he must do so in the manner, to the extent, and for the purposes prescribed and allowed by the laws of the local jurisdiction in which the property is situated. This is the grammatical effect of the qualifying clause.

Whether the matter in hand is the possession, the administration, or the judicial liquidation of the estate, the treaty secures to the consul only the right to "intervene" therein. The word "intervene" is here used with reference to a proceeding in a judicial tribunal. In that connection the word has a settled meaning. The dictionaries declare that when applied to matters of law it means: "To interpose in a lawsuit so as to become a party to it." (Cent. Dic.; Stand. Dic.) Bouvier defines "intervention" at common law thus: "The admission, by leave of court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings." And in the civil law as "The act by which a third party becomes a party in a suit pending between other persons," citing Pothier Proces Civiles, 1ere part, ch. 2, S. 6, 3. (1 Bouv. Dic. Rawles ed. 1114.) A similar definition is given in our Code of Civil Procedure. (Sec. 387.)

Appellants say that the word should be construed according to its literal meaning, "to come between," and that "to come between," in the possession and administration of an estate, means to have a preferred right to act as administrator, if it refers to a time before the appointment is made, or to supersede any other appointee, if used in reference to any subsequent time. This claim is based on the assertion that an intervention was unknown in the civil law, from which it is supposed the Argentine republic takes its system of legal procedure, and also upon the principle that in construing

treaties words are to be given their popular rather than their legal signification.

The constitution of the Argentine republic was adopted on May 25, 1853. It was avowedly modelled upon the Constitution of the United States, which it closely follows, both in general plan and in specific provisions. Its government is federal in form, with "provinces" which correspond to our states, each having power to make its own local laws subject, however, to the civil, criminal, commercial and mineral codes when such should be enacted by the national congress. (Argentine Const., Arts. 105, 108 and 67 [10], vol. 9, Senate Exec. Doc.) The treaty with this country was made in July, 1853. At that time the public men of that country must have been very familiar with the form of government of the United States and with the fact that it committed local affairs to the several states. It is not probable, therefore, that the words of the treaty under consideration were chosen with the intent to have the international agreement become a part of, and in part supplant, the laws of the states of the United States, or of the Provinces of Argentina, in matters committed solely to the states or provinces. The assertion that an intervention, as our law defines it, was not known in civil law countries is shown to be without foundation by the foregoing citation of Bouvier to Pothier, and also by the fact that our own code definition of an intervention, and that of many of the other states, is taken from the code of Louisiana. (Horn v. Volcano W. Co., 13 Cal. 69.) The procedure and jurisprudence of that state, as is well known, was derived from the Code Napoleon and from the system in use in the early Spanish American colonies, both of which are adaptations of the civil law. Justice Field said in Feofroy v. Roggs, 133 U. S. 271, with regard to the construction of treaties: "As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." Appellant quotes this canon of construction as decisive of the sense in which the word "intervene" is to be understood. The court in that case held that the phrase "in all the states of the Union," in the clause of the treaty with France giving citizens of France the right to inherit the property of citizens of the United States, included the district of Columbia. The subject in hand and the context indicated that the phrase was used in the most comprehensive sense, to include the entire country. But treaties are subject to the same rules of interpretation as other documents. The clause of the Argentine treaty relates to legal proceedings for the settlement of estates and the words used are to be given the meaning they usually have when used in that connection. The right to intervene in a legal proceeding partaking of the nature of a proceeding in rem is not usually understood to include the right to

take the property from the custody of the court, or from the officer upon whom the laws of the country impose the duty of administering and distributing it. The object and purpose of the treaty would be fully met by allowing the foreign consul to represent the citizens of his country who are interested as heirs or creditors in case they are not present or otherwise represented, giving him the right to appear in court for them, either officially, or in their name, to protect their interest, and requiring that he be served with notices to them, when notice is required. The use of the word "intervene" implies an intention to give a right to the consul to appear as a party in a pending administration or action carried on by another person, and not a right to institute and carry on the proceeding himself. He has, in addition, a duty pertaining to his office imposed upon him by his own government, that of seeing to the safe keeping and proper disposition of the effects of citizens of his country who may die while traveling, or while temporarily present in the country to which he is accredited, or even while residing therein, and for that purpose, in the absence of any other representative of the deceased having a better right, he may "intervene in the possession" of the estate, conformably with the laws of the country. The custom of nations would permit this and it may be that, if the public administrator refuses or fails to apply, the consul may petition for and receive letters to himself as the official agent for the persons interested. But the treaty is not to be understood as giving him such right in preference to those upon whom it is devolved by the laws of the country when they are present and ready to accept its possession and discharge their duty concerning it. The theory of respondent is, in our opinion, in harmony with the spirit and purpose of the treaty and is in accord with the obvious meaning of the language used.

The order appealed from is affirmed.

SHAW, *J.*

We concur:
ANGELLOTTI, *J.*
LORIGAN, *J.*
HENSHAW, *J.*
MELVIN, *J.*

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an Original opinion filed April 5th, 1910, as shown by the records of my office.

Witness my hand and the seal of the Court, this 10th day of May, A. D, 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

23 [Endorsed:] Original. #1669. Opinion. Ambrose Gherini, Attorney at Law, Italian American Bank Building, S. E. Corner Montgomery and Sacramento Streets, San Francisco, Cal.

24 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Supreme Court of the State of California, Greetings:

Because in the record and proceedings, and also in the rendition of the judgment in a controversy which is in the said Supreme Court of the State of California, said court being the highest court of law or equity in the said state in which a decision could be had in said controversy in the matter of the estate of Giuseppe Ghio, deceased, wherein Salvatore L. Rocca is Appellant and George F. Thompson is Respondent, wherein was drawn in question the construction of the Consular Treaty of 1878 between the United States and the Kingdom of Italy and also the Treaty of 1853 between the United States and the Argentine Republic, and wherein the decision was against the construction claimed by Appellant, a manifest error hath happened to the great damage of Salvatore L. Rocca, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 13th day of June next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

25 Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 6th of May in the year of Our Lord one thousand nine hundred and ten and of the Independence of the United States the one hundred and thirty-fourth.

SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court, Northern District of California.
By J. A. SCHAERTZER,
Deputy Clerk.

The above writ of error is hereby allowed.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

W. H. BEATTY,
Chief Justice of the Supreme Court
of the State of California.

26 [Endorsed:] #1669. Original. Writ of Error. Filed May 9, 1910. F. L. Caughey, Clerk. By Erb, Deputy. Ambrose Gherini, Attorney at Law, Italian American Bank Building, S. E. Corner Montgomery and Sacramento Streets, San Francisco, Cal.

27 UNITED STATES OF AMERICA, ss:

George F. Thompson, Greeting:

You are hereby cited and admonished to appear at the session of the Supreme Court of the United States to be holden at Washington on the second Monday of June, next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of California, wherein Salvatore L. Rocca is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected, a speedy justice done to the parties in that behalf.

Witness, the Honorable Chief Justice of the Supreme Court of the State of California this 6th day of May in the year of our Lord, One Thousand Nine Hundred and Ten.

W. H. BEATTY,
Chief Justice of State of California.

Due service of a copy of the within citation is hereby admitted.
Stockton, California.
This 7th day of May, 1910.

JOHN E. BUDD,
Attorney for Defendant in Error.

28 [Endorsed:] Original. #1669. Salvatore L. Rocca, Plaintiff in Error, against George F. Thompson, Defendant in Error. Citation. Filed May 9, 1910. F. L. Caughey, Clerk. By Erb, Deputy. Ambrose Gherini, Attorney at Law, Italian American Bank Building, S. E. Corner Montgomery and Sacramento Streets, San Francisco, Cal.

29 In the Supreme Court of the State of California.

Sac. No. 1669.

In the Matter of the Estate of GIUSEPPE GHIO, Deceased.

SALVATORE L. ROCCA, Appellant,
vs.
GEORGE F. THOMPSON, Respondent.

On Appeal from the Superior Court of the County of San Joaquin, State of California.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed are true and correct copies of the Petition for Writ of Error; Allowance of Writ of Error, Assignment of Errors, Bond, Prayer for Reversal, Transcript on Appeal, Opinion of the Supreme Court of California; and the original Writ of Error and Citation, as shown by the records of my office in the above entitled case.

Witness my hand and the seal of the Court, this Tenth day of May, A. D. 1910.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk*.
By I. ERB, *Deputy Clerk*.

Endorsed on cover: File No. 22,182. California Supreme Court. Term No. 561. Salvatore L. Rocca, plaintiff in error, vs. George F. Thompson. Filed May 16th, 1910. File No. 22,182.

United States Supreme Court,

OCTOBER TERM, 1910, No. 292

In the Matter of the Estate
of
GIUSEPPE GHIO,
Deceased.

SALVATORE L. ROCCA,
Consul General of the Kingdom of Italy,
Plaintiff-in-Error,

GEORGE F. THOMPSON,
Defendant-in-Error.

Motion to Advance.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The plaintiff-in-error, Salvatore L. Rocca, Consul-General of the Kingdom of Italy at San Francisco, California, respectfully moves this Honorable Court to advance the above-entitled cause upon the docket and set it down for hearing on such early date as shall be most convenient to the Court, on the ground:

(a) That the case is one involving the construction of a Treaty between the United States and the Kingdom of Italy,

(b) That the highest Court of the State of California

and the highest Court of the State of Massachusetts have decided this same question differently.

In the case at bar, the Supreme Court of California affirmed the decision of the lower Courts, refusing to grant to your petitioner as Consul-General of the Kingdom of Italy, Letters of Administration upon the estate of Giuseppe Ghio, a resident of California and a citizen of the Kingdom of Italy, thereby disregarding, (as your petitioner claims), the provisions of the Treaty of May 8th, 1878, between the Kingdom of Italy and the United States of America, by which Treaty there is granted to Consular Officers in the respective countries, "all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the Officers of the same grade, of the most favored nation." (20 U. S. Stats. at Large, p. 732.)

A similar provision exists in more than twenty other treaties. This case thus affects the Consular rights and privileges of the greater number of nations having treaty relations with the United States.

In consequence of the above cited Treaty stipulation, your petitioner claimed the rights which are accorded the Consular representatives of the Argentine Republic by the Treaty between that country and the United States, of July 27th, 1853. (10 U. S. Stats. at Large, p. 1005) by Art. 9 of which it is provided:

> "If any citizen of either of the two contracting parties shall die without Will or Testament, in any of the territories of the other, the Consul-General, or Consul of the Nation to which the deceased belonged, or the representative of such Consul-General or Consul, in his absence, shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

The Supreme Court of Massachusetts in 1906, by reason of these same treaty provisions reversed a decision of the Probate Court, refusing Letters of Adminstration to the Russian Vice-Consul and granting them to the Public Administrator. (Wyman, petitioner, 191 Mass., 276.)

Similar decisions have been rendered in New York by the Surrogate's Court in re Fattosini, 33 Misc., Rep. 18, in re Lobrasciano, 38 Misc., Rep. 415.

On the other hand, the Supreme Court of Louisiana has held that such a right as that claimed by your petitioner "is incompatible with the sovereignty of the State whose jurisdiction extends over the property of foreigners as well as citizens found within its limits." (Lanfear *v.* Ritchie, 9 La. An., 96.)

This very question of the rights of foreign Consuls to administer upon the estates of foreign citizens deceased in the United States is now pending in various jurisdictions, and in view of the lack of any authoritative solution there is resulting, confusion, delay and possible disregard by State Courts and authorities, of the International Treaty obligations of the United States.

The present practice in the Kingdom of Italy in case of the demise of an American is to turn over to the American Consul the effects of the decedent in order that, after the payment of the creditors, the Consul may remit the balance to the heirs. This practice is in accordance with the interpretation of the Treaty here contended for. Its possible discontinuance as a result of the decision of the California Supreme Court emphasizes the necessity of a prompt disposition of the question by this Court.

We are authorized to say that the attorney for the defendant-in-error joins in the request to advance this case.

It is, therefore, respectfully submitted that the case is one, which under the rule, should properly be advanced for an early hearing, the question which it gives occasion and opportunity to decide being one of great in-

terest, national and international and of public importance as involving the attitude of Courts throughout the United States towards the Consular representatives of foreign powers.

Dated, New York, October 1, 1910.

FREDERIC R. COUDERT,
AMBROSE GHERINI,
Counsel for Salvatore L. Rocca,
Consul-General.

Supreme Court of the United States

OCTOBER TERM, 1911, No. 292.

SALVATORE L. ROCCA,
Plaintiff-in-Error,

against

GEORGE F. THOMPSON.

In Error to the Supreme Court of the State of California.

MOTION TO RE-ASSIGN.

And now comes the Plaintiff-in-Error and respectfully petitions this honorable Court that the above-entitled cause now set for argument for October 10, 1911, be passed and re-assigned for hearing during the month of November, 1911, upon such date as this Honorable Court may appoint, for the following reasons:

Frederic R. Coudert, one of the counsel for the Plaintiff-in-Error, had prepared to make the oral argument on behalf of said Plaintiff-in-Error. Suddenly and unexpectedly on September 22nd, 1911, said Frederic R. Coudert was summoned by cable to England by reason of the dangerous illness of his sister who has just undergone two serious

surgical operations. He will be unable to return to the United States in time to present the oral argument on behalf of the Plaintiff-in-Error when the above-entitled cause would, in all probability, be reached on the regular call of the Docket; but unless some very serious turn for the worse should take place in the condition of his sister, he is expected to return to New York about October 23rd, 1911.

Owing to the importance of the questions involved in the cause, an adjudication, at as early a date as possible, is earnestly desired.

For the foregoing reasons, it is respectfully asked that this cause be passed and re-assigned for argument before this Honorable Court as early after the first day of November, 1911, as may be convenient to this Honorable Court.

We are authorized to state that Mr. Eustace Cullinan, counsel for the Defendant-in-Error, has consented to the desired postponement.

Respectfully submitted this ninth day of October, 1911.

PAUL FULLER,
CHARLES A. CONLON,
Of Counsel for Plaintiff-in-Error.

8

RIGHT OF FOREIGN CONSULS UNDER TREATIES TO LETTERS OF ADMINISTRATION UPON THE ESTATES OF THEIR NATIONALS.

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 292

SALVATORE L. ROCCA,
Plaintiff in Error,

against

GEORGE F. THOMPSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERROR.

PAUL FULLER,
AMBROSE GHERINI,
FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for Plaintiff in Error,
No. 2 RECTOR STREET,
New York.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 561.

SALVATORE L. ROCCA,
Plaintiff in Error,

AGAINST

GEORGE F. THOMPSON.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is a writ of error to the Supreme Court of the State of California to review the decision of that Court rendered on the 10th day of May, 1910, in the above entitled matter. As to the facts there is no dispute and they may be stated very shortly.

Decedent, Giuseppe Ghio, was a citizen of Italy, who died intestate on the 27th day of April, 1908, in San Joaquin County, California, leaving a small estate consisting wholly of personal property. He was a resident of California, but his heirs at law, consisting of his wife Maria and three minor children, all reside in Italy. The Plaintiff in Error, Salvatore L. Rocca, is the Consul General of the Kingdom of Italy for California, Nevada, Washington and Alaska Territory.

This case arose by reason of a petition made by the Plaintiff in Error as such Consul-General to the Superior Court for Letters of Administration upon the estate of said Giuseppe Ghio. The Public Administrator, Thompson, also made application for Letters of Administration and the Court

was confronted with the necessity of determining which of these two parties was entitled to such Letters.

Letters of Administration were refused to Plaintiff in Error and granted to the Public Administrator by order of the Superior Court, from which said Consul-General Rocca appealed to the District Court of Appeals in the Third District, which Court affirmed the decision of the Superior Court.

A rehearing in the Supreme Court of the State of California was ordered because as Treaty rights were involved it was deemed advisable that the highest State Court should consider the matter. From the decision of that Court, affirming the decisions of the Courts below, this writ of error is taken.

The Consul-General based his claim to administration of the estate of decedent upon the following provisions of the Treaty of May 8th, 1878, between Italy and the United States:

> "ARTICLE XVI. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the Consuls or Consular Agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested."
>
> "ARTICLE XVII. The respective Consuls General, Consuls, Vice Consuls and Consular Agents, as likewise the Consular Chancellors, Secretaries, Clerks or Attachés, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation." (20 U. S. Stats. at Large, p. 752).

The Plaintiff in Error, by virtue of Article XVII, claimed the rights given to (among others) the Consuls General of the Argentine Republic by a treaty between that country and the United States of July 27th, 1853 (10 U. S. Stats. at Large, p. 1001). The pertinent clause of that treaty reads as follows:

> "If any citizen of either of the two contracting parties shall die without will or testament, in any of the

territories of the other, the Consul-General, or Consul of the nation to which the deceased belonged, or the representative of such Consul-General or Consul in his absence, *shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs* (p. 1009).

The Courts below held that this clause did not confer upon appellant the right to Letters of Administration in preference to the Public Administrator.

Assignment of Errors.

I. The Supreme Court of the State of California erred in deciding that the Consular Treaty of 1878 between the United States and the Kingdom of Italy does not give to the Consul-General of the Kingdom of Italy in and for the State of California the right to administer estates of deceased citizens of the Kingdom of Italy situated within said State.

II. The said Supreme Court of the State of California erred in deciding that Article IX. of the Treaty of 1853 between the United States and the Argentine Republic does not give to the Consul-General of the Argentine Republic in and for the State of California the right to administer the estates of deceased citizens of the Argentine Republic situated within said state.

III. The said Supreme Court of the State of California erred in affirming the order of the Superior Court of the State of California in and for the County of San Joaquin denying the application of this plaintiff in error as Consul General of the Kingdom of Italy in and for the State of California for letters of administration of the estate of Giuseppe Ghio, a deceased citizen of the Kingdom of Italy, who died intestate, leaving estate situated in said County of San Joaquin, State of California.

IV. That said Superior Court of the State of California in and for the County of San Joaquin erred in denying the said application of this plaintiff in error.

V. That said Supreme Court of the State of California

erred in affirming the order of the Superior Court of the State of California in and for the County of San Joaquin granting the application of the defendant in error herein for letters of administration of said estate.

VI. The said Superior Court of the State of California in and for the County of San Joaquin erred in granting the said application of defendant in error for letters of administration of said estate.

Brief of the Argument.

A. The Treaty clauses in question conferring the right of administration of the estates of deceased nationals upon the respective Consuls became part of the Municipal Law of California without further legislation and superseded any State Statute not consistent therewith.

B. The language of the Argentine Treaty, fairly interpreted, confers upon Consuls the right of administration as known to the Common Law and Statutes because

(1) Its plain terms indicate this to have been the intention of the Treaty Making Power, and

(2) The history of the duties of Consuls toward, and their rights over, the estates of their decedent nationals, together with other Treaties and the United States Statutes and Consular Regulations, evidently indicate the intention of the Treaties in question to confer upon the Consuls possession of the property and control of its liquidation and distribution, which powers, under the system of the Common Law, can only be adequately exercised (in cases of intestacy) by an administrator.

C. The authority of judicial decision is in favor of the view of Plaintiff in Error and the decision of the Supreme Court of California is in direct conflict with that of the Supreme Court of Massachusetts.

D. The Most Favored Nation Clause confers upon the Italian Consuls all the rights possessed by Argentine Consuls.

POINT I.

The Treaty Clauses in question conferring the right of administration of the estates of deceased nationals upon the respective consuls became part of the Municipal Law of California without further legislation and superseded any state statute not consistent therewith.

(A) Counsel for Defendant in Error, the Public Administrator, elaborately argues that if the Treaty-Making Authority provides that Argentine Consuls shall have the right " in preference to the local heirs, creditors or public administrator to administer on the estates of citizens of the Argentine Republic dying intestate in the United States, the Treaty in that respect is void as being in excess of the Constitutional Powers, the Treaty-Making Authority and in violation of the rights reserved to the States."

We will not follow counsel far into this domain of constitutional conjecture. The Constitution makes the Treaty the Supreme Law of the land, and no Treaty has as yet ever been declared unconstitutional. That by a broad stretch of legal imagination it may be conceived that a Treaty should attempt to regulate matters so peculiarly within the domain of State autonomy as to strike at the root of our constitutional balance is possible. The short answer here, however, is that one of the most usual, natural, necessary and proper subjects to be regulated by Treaty is the rights, privileges and immunities of diplomatic officers and consuls. This is equally true as to the protection of the persons and property of alien citizens or subjects. A reference to the development of International Law as regards the powers and functions of consuls, to the legislation and regulations of the United States and to the Treaties in force, makes this altogether clear. These matters will be referred to under the next heading in this brief.

As to the general question, we will do no more than enumerate a few of the leading cases in this Court on the subject.

An obviously pertinent statement of the settled doctrine is found in the Head Money Cases :

> "A treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute."
>
> 112 U. S., pp. 598, 599 (Per MILLER, J.).

This statement of the law, as far as we know, has never been dissented from. Should a State Law and a Treaty be in conflict, the State law must give way.

> U. S. vs. Forty-three Gallons Whisky, 93 U. S., pp. 197, 198,

and to the same effect:

> Ware vs. Hilton, 3 Dall., 235.

It is also established by the decisions of this Court that such Treaties must be construed in most liberal fashion, and that Treaty rights are always paramount to State Legislation.

> Shanks vs. Dupont, 3 Pet., 249.
> Geofroy vs. Riggs, 133 U. S., 267.
> Hauenstein vs. Lynham, 100 U. S., pp. 488–90.

In the case of Wyman, Petitioner, in the Supreme Court of Massachusetts, 191 Mass., 276, hereinafter referred to, the Attorney General made a similar argument to that here presented by Counsel for the Public Administrator, relying upon the decision of the Supreme Court of Louisiana in the matter of the Succession of Charles Thompson (Lanfear vs. Ritchie), reported in 9 La. An., 96. This decision is very short and is as follows:

> "OGDEN, J. The succession of the deceased was duly opened in the Second District Court as that of a foreigner not domiciled in this State, and leaving property within the jurisdiction of the Court. The petitioner, as Vice-Consul of the King of Sweden and Norway, for the port and city of New Orleans, represents that the deceased was a Swede by birth, and at the time of his death was a subject of the King of Sweden. On this ground he claims the right, in his capacity of Consul, to take the succession out of the hands of the defendant, who is the duly appointed administrator. This right he alleges he is entitled to exercise under the law of nations, the laws of the United States, and by virtue of treaties entered into between the United States and the King of Sweden and Norway.
>
> The right claimed is incompatible with the sovereignty of the State, whose jurisdiction extends over the property of foreigners as well as citizens found within its limits. The disposition of the estates of foreigners has been made the subject of special legislation, and no treaty or law of the United States exists which as the paramount law confers any such right as is claimed by the petitioner; nor are we aware of any principle of the law of nations which would entitle the petitioner to call in question the authority of our laws on that subject."

The Supreme Court of Massachusetts said of this case:

> "In Lanfear v. Ritchie, 9 La. Ann., 96, decided in 1854, the decision was against the Vice-Consul of Sweden and Norway on the ground 'that the right

> claimed was incompatible with the sovereignty of the State.' But this is at a time when we might expect the doctrine of State rights to be strongly insisted upon."

We confidently submit that this Court cannot and will not hold that the duties and functions of consuls regarding the estates of their decedent nationals is not a proper subject for regulation by the Treaty Making Power and that the numerous Treaties, Statutes and Regulations dealing with this subject are unconstitutional because " incompatible with the sovereignty of the State."

The present case was in litigation at or about the time when the Japanese school question was of paramount interest in the State of California, as well as in the Nation. While it is not intended to intimate that this may have influenced the decision in this case, which is not put on the ground of the unconstitutionality of the treaty clauses referred to, yet possibly the atmosphere of the State of California may have insensibly caused its learned Courts to gravitate toward a view of State rights which seems inconsistent with the later developments of our constitutional law and even irreconcilable with prior decisions of the Supreme Court of the State of California itself.

In *People vs. Gerke, 5 Cal., 381, 384 (1855)*, there was considered a treaty with Prussia of 1828 which provided that where, upon the death of a person holding real estate, it would descend upon a citizen or subject " were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same and to withdraw the proceeds without molestation."

The objection was made by the Attorney-General of California that the enforcement of such a provision (p. 384) " permits the Federal Government to control the internal policy of the States, and in the present case to alter materially the statutes of distribution." The Court says (p. 384) :

> " If this were so to the full extent claimed, it might be a sufficient answer to say, that it is one of the results of the compact, and if the grant be considered too improvident for the safety of the States, the evil can be remedied by the Constitution making power."

In *Forbes vs. Scannell, 13 Cal., 243, 276-282,* was considered a provision of the laws of California (the act for the relief of insolvent debtors) that " No assignment of any insolvent debtor, otherwise than as provided by this Act, shall be legal or binding upon creditors." Nye Brothers & Co., an American firm doing business at Canton, China, failed. Gideon Nye, the resident partner, executed an assignment for the benefit of creditors before the United States Consul. Property of the firm in San Francisco was seized by their creditors. The assignee sued the Sheriff for damages, claiming precedence for the assignment over the Court process under which the creditors seized the property, as being supported by the Treaty with China of July 3, 1844, and the Act of Congress of August 11, 1848, to carry into effect the provisions of the Treaty. There was no question that the assignment was not executed in accordance with the California Statute, but the Treaty and the Statute of 1848 regulating the rights of American citizens in China validated such assignment if made either in accordance with (1) the Laws of the United States, (2) the Common Law or (3) Decrees and Regulations to be made by the United States Commissioner to China.

This displacement of the insolvent laws of California by the Treaty was explicitly upheld, and judgment rendered for plaintiff assignee.

(Following, citing and approving People vs. Gerke, 5 Cal., BALDWIN & FIELD, JJ.).

B. THE LANGUAGE OF THE ARGENTINE TREATY CONTEMPLATES ADMINISTRATION OF ESTATES OF DECEASED NATIONALS BY THE RESPECTIVE CONSULS.

(1) In the view of the Courts below the question seemed to turn mainly, if not wholly, upon the phrase in the Argentine Treaty: " *The right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country for the benefit of the creditors and legal heirs.*"

The view of the appellant is that this language is inconsistent with any fair interpretation, which does not involve the

right of administration. The Supreme Court of California took an opposite view :

> " The clause of the Argentine treaty relates to legal proceedings for the settlement of estates and the words used are to be given the meaning they usually have when used in that connection. The right to intervene in a legal proceeding partaking of the nature of a proceeding *in rem* is not usually understood to include the right to take the property from the custody of the court, or from the officer upon whom the laws of the country impose the duty of administering and distributing it. The object and purpose of the treaty would be fully met by allowing the foreign consul to represent the citizens of his country who are interested as heirs or creditors in case they are not present or otherwise represented, giving him the right to appear in court for them, either officially, or in their name, to protect their interest, and requiring that he be served with notices to them, when notice is required. * * * He has in addition, *a duty pertaining to his office* imposed upon him by his own government, that of seeing to the safe keeping and proper disposition of the effects of citizens of his country who may die while traveling, or while temporarily present in the country to which he is accredited, or even while residing therein, and for that purpose, in the absence of any other representative of the deceased having a better right, he may ' intervene in the possession ' of the estate, conformably with the laws of the country. The custom of nations would permit this, and it may be that, if the public administrator refuses or fails to apply, the consul may petition for and receive letters to himself as the official agent for the persons interested. But the treaty is not to be understood as giving him such right in preference to those upon whom it is devolved by the laws of the country when they are present and ready to accept its possession and discharge their duty concerning it."

It will be noticed that the learned court concedes that to intervene in the possession means something more than

ordinary intervention (or becoming a party to a law suit), and that where the rights of a public administrator or a resident heir are not in question, the consul would probably be entitled to administration. This position seems to us wholly illogical. If the language referred to is broad enough to confer the right of administration at all, it must be unlimited by any State Statute attempting to confer a prior or paramount right upon a State official. If it means administration it means that the consul shall have that right in any and all events.

In final analysis we cannot avoid the conclusion that the decision of the Supreme Court of California virtually challenges the constitutionality of the Treaty, and logically and impliedly at least, although not avowedly, takes the ground that the Treaty cannot supersede the local law as to administration.

We will first consider the precise language of the Argentine Treaty by itself, and without regard to the historic development of the Consular custody of decedent estates.

Intervene. The recognized term "intervene" standing by itself or in conjunction merely with a judicial proceeding, is, as counsel for the Public Administrator suggests, of like significance in the Common and in the Civil Law, and Pothier's definition is in accord with the Common Law Dictionaries—*i. e.*, "An act by which a third party becomes a party to a suit pending between other persons." This is in accord with Escriche's definition of the term in Spanish Law, and if the treaty intended to limit the authority of foreign consuls to this well-known formula, it would have sufficed to say merely "intervene in the judicial liquidation." The words "intervene in the *possession* and *administration* of the estate" were, however, added to the mere permission to become a party to the litigation or "judicial liquidation" and they are either meaningless surplusage, or are meant to convey the power of taking "*possession*" of the estate, and protecting it for the Consul's absent nationals by authoritative "*administration*" of it, *i. e.*, the care, management, investment, control and supervision of it. To adopt the language of the Court quoted by counsel:

> "International Treaties are usually, if not invariably, prepared with great care by men of learning and

> experience accustomed to select words apt to express precisely and fully the intention of the contracting parties;"

and when in the Treaty under discussion, these "men of learning and experience" added to the universally recognized "intervention" known equally to the systems of law of the respective countries, as the right to become a party to a judicial proceeding, the specific right to "intervene in the possession and administration of the estate" they used "words apt to express precisely and fully the intention of the contracting parties," to wit, that the actual "possession and administration of the estate" should be confided to the Consular officer, whose "intervention" was authorized for that very purpose, while the "judicial liquidation," *i. e.*, the distribution of the property "conformably with the laws of the country" was proceeded with by the Courts, the Consul intervening there also as a party.

Moreover, the Treaty must be interpreted in the light of the Civil Law as well as of the Common Law. What is the right to "intervene in the possession" in the Civil Law? Under that system, no administrator stands between the heir and his right of possession; and the authority given by the Treaty to the Consul to "intervene in the possession of the estate for the benefit of the legal heirs" must of necessity clothe him with the power to take that "possession" which in Civil Law the heirs would take directly, and which under the Common Law would be taken by an administrator. The term "for the benefit of creditors," does not affect the situation, as in one or the other case, the estate is subject to their claims, in the one case, in the hands of the heir, and in the other in the hands of the administrator, *i. e.*, in this case the Consul, who is charged specifically with the protection of the creditors as well as the heirs.

In other words the term "administration" refers purely to a category of the Common Law and its derivative American Statutes. Discussion as to whether or not Plaintiff in Error should have a right to Letters of Administration largely begs the question. What he is entitled to is (1) immediate possession of the estate upon the decease of his intestate national; (2) power of liquidating such estate, paying debts, etc.; (3)

power of distributing estate to the heirs or parties entitled thereto.

These are the functions normally devolved upon a consul as we shall show hereafter by the the Statutes of the United States. They were the functions aimed at by the words "to intervene," etc. The United States was dealing with a country subject to the regime of the Civil Law. The technical terms of either Civil Law or Common Law jurisprudence were necessarily to be avoided. The powers so conferred upon a Consul cannot be adequately exercised in this country save by granting to him Letters of Administration, because, unless armed with such letters, he cannot perform the functions above enumerated. To deny him such letters is, therefore, in effect to deprive the Nation to which he belongs of the rights conferred upon it by Treaty.

The learned counsel for the Public Administrator has a theory regarding the phrase "intervene in the possession" which seems to us in principle to concede away this case.

"Possession," says counsel, "refers obviously to possession *after* distribution as representative of absent heirs, *or to the custom by which a consul puts his official seal upon the effects of a deceased person* until the local law operates on them by a grant of administration."

(a) The meaning of the phrase "*intervene in the possession*" is thus admitted by counsel to be the equivalent of "take into his possession," for the "possession after distribution as representative of the absent heirs" can be no other than actual possession.

(b) It cannot refer to possession solely after distribution, for it is coupled with a right of administration given as strongly as the right of possession, and after distribution there is no further administration.

(*c*) The other alternative to which counsel applies the term is "to the custom by which a Consul puts his official seal upon effects of a deceased person until the local law operates on them by a grant of administration". This concedes to the consul a right so universal and of such long standing as to be a custom, to intervene, to "come between" the local authorities and impound the effects of the decedent, not "after distribution" but prior to administration, and until administration. This is "obviously" the right here claimed and

clearly recognized by the Treaty. But as this "custom" only recognizes the right of consular possession "until the local law operates on them by grant of administration" the Treaty goes farther and secures to the Consul, not only this right of immediate and interim possession, but in equal terms the further right of "administration," the exercise of which makes the right of possession absolute.

Counsel admits the necessity of drawing inferences from the language of the Treaty, in order to determine its true intent.

> "The Consul of a nation is an official *charged with the duty*, among other things, of protecting the interests of his fellow countrymen,"

says counsel, from which he draws the inference that the rights and privileges granted to the Consul by the Treaty "for the benefit of the creditors and legal heirs," must "refer to the foreign creditors and the foreign heirs."

We have no present quarrel with this inference as no such situation is here presented, but we would follow with the further obvious inference that when in order to enable the Consul fully to discharge the "duty of protecting the interests of his fellow countrymen," the Treaty directly clothes him with the power "to intervene *in the possession and administration* * * * of the estate" as well as "to intervene *in the judicial liquidation*" thereof, adopting counsel's citation from Vattel:

> "great attention should be paid to this circumstance" as "the most certain clue to lead us to the discovery of its true meaning."

(2) It is the general practice under the law of nations for Consuls, upon the death of one of their nationals, to take part in caring for the property left by him, especially in case of intestacy, and seeing that it reaches its destination. This is one of the usual and normal functions of the Consuls of all civilized nations and as such is generally recognized by usage, by Statute and by formal Executive Regulations in the United States and in European countries.

The laws of the United States on this subject are therefore nothing more than a codification of international usage. As showing how widespread and established this usage has become we cite the following from a standard French work on the subject, Guide Pratique des Consulats, by de Clercq and de Vallat, a work of generally recognized value. It is said (Vol. I, p. 522):

> "SEC. 533. Intestate succession. Finally, if the deceased has left no will, or if there are no heirs present, the succession must then be considered as vacant and the consular authority intervenes to assure its conservation for the protection of those who may have rights therein.
>
> "The first formality to fulfil in this case consists in placing the seals upon the domicil of the deceased. Some Governments in order to assure the payment to possible creditors have this proceeding performed at once by their officers of justice; others, and this the greater number, recognize the right of Consuls to put their seals on, together with those of the territorial authority; some others consent to the Consul alone placing his seals (on the property) upon condition that should local creditors present themselves their rights will be unaffected.
>
> "At the expiration of the time fixed by law the seals are taken off and the property examined and inventoried. The inventory is made either by the Consul or by the local authority in the presence of the Consul.
> * * *
>
> "The inventoried articles are preserved in storage either at the Consulate or in the house of the deceased under the care of the consul to whom generally, in accordance with Treaties, the territorial authority abandons the right of liquidation of successions. In some countries, however, it is this authority which administers and liquidates the successions itself and then turns over the proceeds to the legitimate heirs or hands them to the Consuls."

The general powers of United States Consuls were admirably set forth by Secretary Marcy in 1855. He says :

> " The Consuls of the United States are authorized and required to act as administrators of the estates of all citizens of the United States dying intestate in foreign countries and leaving no legal representative or partner in trade. Indeed this is one of the most sacred and responsible trusts imposed by their office and in this respect they directly represent their government in protecting the rights and interests of the representative of deceased persons."
>
> Moore Int. Law Dig., Vol. 5, p. 118.

> " As far back as 1799, Mr. Pickering, then Secretary of State, " citing a clause of the Jay treaty, to the effect that Consuls should 'enjoy those liberties and rights which belong to them by reason of their function', said : 'Now, I conceive one of the consular rights and a duty to be to receive, inventory, take care of and account for the effects of any subject of the nation by which the consul is appointed, and who dies within his jurisdiction or consulate.' He added that the subject was often explicitly regulated by Treaties, but that he understood it to be 'a general usage to which civilized nations have tacitly or practically assented.' "
>
> Moore, *Id.*, p. 117.

The recognition of this general usage is embodied in our Revised Statutes as follows :

> " SEC. 1709. *Estates of decedents.* It shall be the duty of consuls and vice-consuls, where the laws of the country permit :
>
> FIRST. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

SECOND. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

THIRD. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

FOURTH. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

FIFTH. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings."

Fed. Stat., Vol. 2, p. 797.

The Consular Regulations of the United States set forth in detail the duties of consuls in this matter and contain the same general principles as those that we have quoted from the Guide Pratique des Consulats.

These Regulations provide:

"Sec. 409. A consular officer is by the law of nations and by statute the provisional conservator of the property within his district belonging to his countrymen deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate, or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them to the United States, or to aid others in so guarding, collecting and transmitting them, to be disposed of pursuant to the law of the decedent's State--7 Op. Att. Gen., 274. It is, however, generally conceded that a consular officer may intervene by way of observing the

proceedings, and that he may be present on the making of the inventory.

"Consul's Powers Under the Treaties.

* * * * * *

"Sec. 411. *Argentine Republic and Colombia.*—Consular officers in the Argentine Republic may, when any citizen of the United States dies within their respective jurisdictions, intervene in the possession, administration, and judicial liquidation of his estate, conformably with the laws of the country. The proceedings in such case must be in the ordinary courts of the country, unless waived by the local authorities. In Colombia a consular officer has the right to take possession of the effects of a deceased citizen, and to make inventories and appoint appraisers. In his proceedings he is required to act in conjunction with two merchants, chosen by himself, and in accordance with the laws of the United States and with the instructions he may receive from his own Government."

United States Consular Regulations, pp. 161–2.

Section 78 of the Consular Regulations refers to the Favored Nation Clause as follows:

"78. Some of the consular treaties of the United States contain a clause commonly called 'the most-favored-nation clause.' This right is secured by treaties with the Argentine Republic, Austria-Hungary, Belgium, Bolivia, Colombia, Costa Rica, the Dominican Republic, Denmark, Ecuador, Egypt, France, Germany, Hawaiian Islands, Hayti, Honduras, Italy, Kongo Free States, Korea, Japan, Madagascar, Morocco, Netherlands (and colonies), Nicaragua, Orange Free State, Paraguay, Persia, Peru, Portugal, Prussia, Roumania, Russia, Salvador, Servia, Spain, Switzerland and Tripoli. In those countries consuls of the United States are entitled to claim as full rights and privileges as have been granted to consuls of other nations" (*id.*, p. 30).

Treaties of the United States with foreign countries generally contain provisions regarding the authority of Consuls and

their duties in connection with decedents estates. These provisions usually state somewhat more precisely and in detail the power of consuls as developed by the consensus of Nations. They differ, however, in this respect from mere International Law and usage, in that where the functions of a consul are fixed by treaty, his authority must necessarily override local statute, whereas in the absence of such treaty his foreign functions are largely auxiliary to the local law which may, unless it recognizes very fully international comity, reduce the consul's functions as regards decedents' estates within somewhat narrow limits.

The general trend, however, of international law is to constantly broaden such functions, and this is made very plain by an examination of the various treaties of the United States. We shall herein refer to a few of them.

Article 15 of the Treaty of 1880 with Belgium provides that

> " in case of the death of any citizen of the United States in Belgium, or of any citizen of Belgium in the United States, without having any known heirs or testamentary executor by him appointed, the competent local authorities shall give information of the circumstance to the Consuls or Consular Agents of the nation to which the deceased belongs, in order that the necessary information may be immediately forwarded to parties interested."
>
> " Consuls-General, Consuls, Vice-Consuls and Consular Agents shall have the right to appear, personally or by delegate, in all proceedings on behalf of the absent or minor heirs, or creditors, until they are duly represented."

The Treaty of 1851 with Costa Rica, Article 8, provides :

> " If any citizen of either of the two high contracting parties shall die without will or testament in any of the territories of the other, the Consul General or Consul of the nation to which the deceased belonged, or the representative of such Consul General or Consul in his absence, shall have the right to nominate curators to take charge of the property of the deceased, so

far as the laws of the country will permit, for the benefit of the lawful heirs and creditors of the deceased, giving proper notice of such nomination to the authorities of the country."

A similar provision is found in the Treaty of 1864 with Honduras.

The Tenth Article of the Treaty of 1859 with Paraguay provides :

"In the event of any citizen of either of the two contracting parties dying without will or testament in the territory of the other contracting party, the Consul-General, Consul, or Vice-Consul, of the nation to which the deceased may belong, or, in his absence, the representative of such Consul-General, Consul, or Vice-Consul shall, so far as the laws of each country will permit, take charge of the property which the deceased may have left, for the benefit of his lawful heirs and creditors, *until an executor or administrator be named by the said Consul-General, Consul, or Vice-Consul, or his representative.*"

The Treaty of 1856 with Persia, Art. VI, provides :

"In case of a citizen or subject of either of the contracting parties dying within the territories of the other, his effects shall be delivered up integrally to the family or partners in business of the deceased ; and in case he has no relations or partners, his effects in either country shall be delivered up to the Consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country."

The Treaty of 1887 with Peru which was terminated by notification from Peru October 8th, 1898, contained the following provision :

"ART. 33. Until the conclusion of a consular convention, which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated, that in the absence of the legal heirs or represent-

atives the consuls, or vice-consuls of either party shall be *ex-officio* the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea whose property may be brought within their district."

The international sanctity of such a Treaty Clause is instanced by the decision of the Mixed Commission in the arbitration between Peru and the United States of 1857.

This Commission in the matter of Vergil awarded damages to the heirs of the deceased Peruvian citizen Vergil because the Peruvian Consul was not allowed to act as executor or administrator in accordance with the Treaty of July 26th, 1851.

4 Moore Int. Arb., 4390.

C. JUDICIAL PRECEDENTS AS TO THE RIGHT OF CONSULS TO ADMINISTRATION.

The precedents on the subject are few. They may be enumerated as follows:

In re Wyman, 191 Mass., 276.
In re Fattosini (N. Y. Sur. Ct.), 33 N. Y., Misc., p. 18; see also 67 N. Y. Supp., 1119.
In re Tartaglio (Sur. Ct.), 12 N. Y., Misc., p. 245.
In re Lobrasciano, 38 Misc., Rep. N. Y. (Sur. Ct.),. 415; see also 77 N. Y. Supp., 1040.
Matter of Logiorato, 34 Misc. Rep., 31 (Sur. Ct.).
Aspinwall vs. Queen's Proctor, Prerogative Ct. of Canterbury, 1839, 2 Curteis Rep., 241.
Succession of Thompson, 9 La. An. 96, vd. *supra*

It will be seen that these cases are all decided by Courts of First Instance with the exception of the Wyman and the Louisiana cases. For the convenience of the Court we print as an appendix herein the opinion of the Supreme Court of Massachusetts in the Wyman case, and also the very detailed and well considered opinion of Surrogate SILKMAN in the Lobrasciano case.

The weight of authority, as far as there are precedents aside from the decision at bar, is wholly in favor of the rights of the consul here contended for.

The Supreme Court of the State of Massachusetts unanimously upheld the right of the Russian Consul to have letters

of Administration in Massachusetts and referred with approval to the decision of the Surrogate of Westchester County heretofore referred to. That Court also disposed of the contention of the counsel for the Commonwealth that the matter was not properly within the scope of the Treaty Making Power as follows :

> " While it may be true that there is some limit to the powers of the President and Senate in making treaties, as has been intimated in some of the cases in the Supreme Court of the United States, we cannot accede to the contention of the counsel of the public administrator, that the treaties in question in this case are beyond the jurisdiction of the treaty making power : nor can we accede to the further contention as to the construction of the treaty which was adopted by the judge of the probate court " (191 Mass., 27).

The Surrogate of New York County took a different view. While granting the application of the Consul-General of Italy for Letters of Administration in the case of Logiorato, *supra*, he intimated that he would not have done so had the public administrator applied. This case does not seem, however, to have very fully considered the question, and rests largely upon the decision in the Louisiana case and that of the Prerogative Court. The Louisiana case, to which we have already adverted, turned largely upon a view of State rights now obsolete, and no particular treaty clause was apparently invoked.

In Aspinwall vs. Queen's Proctor, 2 Curteis, 241, the application was made by the American Consul to take administration of the goods of an American subject, domiciled in France, who died *in itinere*, leaving personal property within the jurisdiction of the Court. The application was denied by Sir Herbert Jenner on the ground that the American Statutes as to consular functions could not override the English law.

> " The question, therefore, is not whether the law of America authorizes the Consul to take possession of the property of its subjects dying in this country, but whether the law of this country permits it, and it is upon the ground that it does so, that Colonel Aspinwall applies for letters of administration.

"I am not aware of any case in which it has been held that, by the law of this country, it is competent to a foreign Consul to take possession of the property of a foreigner dying here, *in itinere*, domiciled in his own country. * * *

"It has been said, that by the law of the United States, British Consuls may take possession of the property of British subjects in similar circumstances. But this is not by the Law of Nations, but by custom or express enactment, and it is not a law which this country is bound to follow; *this country has not adopted the principle of reciprocity in this respect.*" (pp. 246–7.)

This case can have no bearing upon the point at issue here, as no treaty expressly creating such reciprocity was invoked; the decision of the Prerogative Court cannot have any pertinency here.

The view maintained by the Italian Government is supported by Devlin in his work on the Treaty Making Power as follows:

"§ 202. *Right to administration.* A consul of a foreign country is entitled to administer upon the estate of subjects of his country, dying intestate, and the clause in a treaty giving him 'the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased' will have the effect of superseding a state law giving the right of administration to a local officer. The power conferred upon the consul by the words above quoted is not limited by the succeeding words 'conformably with the laws of the country for the benefit of the creditors and legal heirs.' These words relate merely to the procedure of administration and not to the right to administer. The fact that a treaty cannot be reconciled with a state law is no reason why a state court should not enforce it."

The plain intent of the Argentine Treaty, as indicated by its terms and as evidenced in the development of international law, certainly was that the consuls should have those rights as to possession, liquidation and care of the estate which necessarily involve administration.

POINT II.

The Most Favored Nation Clause.

The Treaty of 1878 with Italy provides in Article XVII, that the respective Consuls "shall enjoy in both countries all "the rights, prerogatives, immunities and privileges which are "or may hereafter be granted to the officers of the same grade "of the most favored nation."

Is there any meaning in this reciprocal stipulation? Has it any force or virtue or is Article XVII of the Treaty a mere idle form of diplomatic verbiage?

Article XVI of the same treaty makes it obligatory on the competent local authorities in either country to advise the Consuls of the other high contracting party of the death of any of its nationals "who has no known heir or testamentary executor designated by him * * * to the end that that information may at once be transmitted to the parties interested." While this information officially imparted to the Consul under the obligation of the Treaty is being imparted to the absent and distant "parties interested" the Consuls under the succeeding Article XVII. are to exercise such rights, prerogatives and privileges as have been or may hereafter be granted to Consuls of the most favored nation. The estates of Americans dying in Italy without known heirs and without having appointed testamentary executors are confided to the United States Consuls to the same extent as Italy has confided like privileges of custody to the Consuls of other countries.

In other words the Consuls of the United States in Italy are given such rights, prerogatives and privileges over the estates of Americans dying in Italy without known heirs and without having appointed testamentary executors, as Italy has given or may hereafter give to the Consuls of any other nation. The estates of Americans dying in Italy are guaranteed the utmost measure of Consular protection that Italy may at any time accord to the estates of other nationals dying within her borders, and the converse is stipulated as to the estates of Italian subjects in the United States.

Is there anything unusual, anything dangerous, anything

contrary to the advancing spirit of international peace and comity in such a stipulation? The Treaty is not made for a day. Nor was it needful or wise that it repeat in detail the particular powers and privileges intended for the protection of absent heirs, lest by the enumeration of some, others be excluded. The purpose being ample protection, and the expression of mutual good will between the high contracting parties, and confidence in their respective consular representatives, no better form could be adopted to carry out such purpose than the pledge that no greater confidence shall be reposed in the representatives of other nations, and no greater powers granted to them in the exercise of their official functions.

The opinion of Attorney-General Cushing in 1853, that the provision in the treaty with Denmark that neither party to it should "*grant any particular favor* to other nations in respect "of commerce and navigation, which shall not immediately "become common to the other party" and that their respective consular officers should enjoy the rights and privileges of the most favored nation, did not operate to give to the contracting parties the rights covenanted in a subsequent treaty with Sweden and Norway whereby the local authorities of each country were required to surrender deserting seamen to the consuls of their respective countries, is subject to distinctions and does not moreover represent any International rule definitely adopted by the United States. (1) The stipulation is cautiously reserved to the terms: "Not to *grant any particular favor*," and the privilege which Denmark claimed was an affirmative right to the forcible aid of the local authorities for the arrest and surrender of seamen, a right as to which all the traditions of this country forbade any inferential admissions, and which by its nature required the most unequivocal authority, only to be granted upon assurances that respect for the liberty of the citizen was as sacredly guarded by the other party to the Treaty as it was in the United States.

The terms, "not to grant any particular favor," to some extent justified, at all events explained, in conjunction with the character of the privilege sought to be enforced, the technical construction maintained by Mr. Cushing that only favors freely given to Denmark could be claimed by Sweden and Norway, or "on allowing the same compensation, if the "concession were conditional," an allowance which in a case

concerning the personal liberty of individuals, required of necessity a specific stipulation, as it could not prudently be left to inference.

(2) To sustain his opinion Mr. Cushing invokes the rule that all the articles of the Treaty must be considered together and no one article can be considered by itself. This is no other than the rule applied to all contracts and applied by this Court in testing the constitutionality of Statutes, and it is subject to the fundamental restriction which makes it inapplicable when the stipulations of the contract or the provisions of the Statute are separable, and where the provision affected does not disturb or overturn the scheme of the whole. —This view has been adopted in the diplomatic and international usage of this country.

When the Government of Hayti, in 1901, invoked a similar reasoning to justify its refusal to afford to the United States under the Most Favored Nation Clause in our Treaty of 1864 (Art. X), the same favorable rate of tonnage dues accorded to France by a Treaty of 1900, the United States refused its assent, and insisted under the most favored nation clause upon the same rate of tonnage as that accorded to France. Hayti contended that Article X. which provided that the dues to be collected should not be higher than those levied upon "vessels of the most favored nation" should be taken in connection with Article II., which provided for the extension of any favor granted to a third power "gratuitously" if the concession was gratuitous or "in return for an equivalent compensation" if it was conditional. The United States replied that Article X. was

> "quite independent of Art. II. and creates absolute "rights which the Government cannot fail to insist "upon. Should therefore any higher charges be col- "lected on American tonnage than that of any other "country they will be reclaimed."
>
> Mr. Hay & Mr. Hill, Foreign Relations, 1901, pp. 278, 279 [Cited Moore, INT. LAW, Vol. V., pp. 318, 319].

This contention the United States have adhered to against themselves.

In 1874, the Government of Sweden and Norway made

representations to our Government that the collection of tonnage and other harbor dues upon vessels engaged in regular navigation between its country and ours should cease and that a refund should be made of all such dues collected since 1858, the date of a Treaty with Belgium, whereby Belgian vessels were exempted from such dues.

Article II of the Treaty with Sweden of 1783, revised and made applicable to Sweden and Norway in 1827, provided that any particular favor thereafter granted to other nations in respect to commerce and navigation should at once become common to the other party.

Article IV of the Treaty between the United States and Belgium stipulated that steam vessels of the United States and of Belgium engaged in regular navigation between their respective countries should be exempt from harbor dues. The representations of the Government of Sweden and Norway were referred to the Attorney General (Williams), who replied:

> "The conclusion is inevitable that whatever favors "or exemptions are enjoyed by the regular steam "navigation of Belgium plying between that country "and the United States, are 'common' to the like "navigation of Sweden and Norway. * * * The "Departments of State and of the Treasury concede "that the claim of this Norse line of steam vessels to "be exempt in the ports of the United States from the "payment of duties of tonnage, &c., is just and reason-"able, and they are brought to this concession by an "examination and review of the treaty provisions, "&c. * * *
>
> "But, if it is just and reasonable now and in the "future * * * it has been so at all times in the "past since the ratification of the treaty with Belgium "of July 17, 1858. No language can make this plainer "than it is upon the face of the treaties."

On the question of reciprocal concessions by Sweden and Norway such as were conceded by Belgium, it was stated that there were as yet no steam vessels of the United States engaged in regular navigation between the United States and Sweden and Norway and it could not therefore be certainly

stated whether tonnage dues would be exacted by Sweden and Norway. To this the Attorney-General replied:

> "It is to be presumed that they will when the occa-
> "sion shall arise, faithfully perform their duty under
> "the treaties; for the obligations imposed by them are
> "reciprocal. But either of the contracting parties may
> "claim the benefit of them, even if the other should
> "never inaugurate regular steam navigation between
> "the two nations."

He concludes that the dues

> "have been exacted contrary to the stipulations of
> "the treaties above set forth and contrary therefore
> "to law. The amounts in the treasury so collected are
> "not the moneys of the United States but belong to
> "the owners of the said line of steamers. It is
> "money had and received to their use and they are en-
> "titled to have it refunded to them."
>
> Williams, Att'y-Gen'l, Opinions XIX., 468–470.

Two other instances may also be noted.

A treaty between France and the Hawaiian Islands conceded to Consuls exclusive cognizance of all crimes and misdemeanors affecting the internal order of merchant ships where the disputants were "exclusively French or Hawaiian subjects."

Under the Treaty between the United States and Hawaii, stipulating that Consular officers of the contracting parties should enjoy the same privileges and powers with those of the Most Favored Nation, the Attorney-General advised that the Consul of the United States at Honolulu had exclusive cognizance of disputes on American vessels between citizens of the United States.

Speed, Atty-Genl., 11 Op., 508.

We quote from the Opinion:

> "It is unnecessary to discuss the question, whether
> this treaty conferred any judicial power upon the con-
> suls of the United States in the Hawaiian kingdom,
> because it is agreed that the consuls of the two contract-

ing parties shall enjoy the same privileges and powers with those of the most favored nations; and if, therefore, by treaty with any other nation, either of the parties should confer judicial power upon consuls, then, by the intention and express words of the treaty betwixt the United States and the Hawaiian kingdom, the consuls mentioned therein were to have like power. Such power was conferred by the twenty-first article of the treaty entered into betwixt the Emperor of France and the King of the Sandwich Islands." (pp. 509–10.)

Again, in the Treaty between Spain and Nicaragua of July 25, 1850, Spanish subjects in Nicaragua were exempt "from every extraordinary charge, or contribution, or forced loan." By the Treaty between the United States and Nicaragua of 1867, embodying the Most Favored Nation Clause, the Department of State approved the action of the American Minister in notifying American citizens in that country that they were exempt from an extraordinary loan called for by the Nicaraguan Government, apportioned among citizens and aliens alike.

Moore Int. Law, Vol. 5, 313, 314.

We have, therefore, three concrete instances of the attitude of our Government with reference to the Most Favored Nation Clause, insisting upon the one hand on its own rights under such a clause and on the other yielding those same rights to another power.

We may now pass to a consideration of the general understanding of the clause in question.

In 1830 while the United States were negotiating a Treaty with France intended to put an end to controversies running back to 1817 with reference to French rights under the Treaty ceding Louisiana, Mr. Van Buren writing to Mr. Rives suggests that a Treaty might be made stipulating a reciprocal and reasonable reduction of duties upon French wines

"taking proper care, however, that the stipulation for this reduction of duties does not conflict with our en-

gagements to other nations, by which we are bound to impose no higher duties upon articles the produce of the soil or industry of those nations, than upon similar articles of other nations."

Moore Int. Dig., Vol. V., p. 259.

This caution with reference to one of the forms of the Most Favored Nation Clause indicates the effect and weight of such a clause in the opinion of our Government.

In 1824 a Treaty with Colombia provided a Most Favored Nation Treatment, freely if the concession was freely made or for a like compensation if conditional.

A subsequent Treaty between Colombia and Central America provided for a partial abolition of discriminating duties between the two countries. The American Minister demanded the extension of the benefit of that Treaty to vessels of the United States. The Colombian Government replied that we could not claim to enjoy those benefits without granting a reciprocal privilege to Colombian vessels in our ports. This reciprocal privilege had evidently not been theretofore granted. A reciprocal arrangement was at once concluded to cover this deficiency and an Act of Congress was passed on the 19th of May, 1832 (4 Stat., 515), authorizing the President to exempt from duties in the United States Colombian vessels and their cargoes which should go directly from ports of that nation to the United States, so that as soon as reciprocity was granted the Most Favored Nation Clause came into operation.

Moore Dig. Int. Law, Vol. 5, p. 260.

In the present case that reciprocity exists. The stipulations are in their terms reciprocal, and the same privileges granted to United States Consuls in Italy are *ipso facto* granted to Italian Consuls in the United States.

This theory upon which the Government acted as early as 1832 is sustained and followed in the case of the Treaty with Sweden and Norway above alluded to in the opinion of Attorney-General Williams.

In the discussions with Great Britain during 1884 and 1885 concerning Treaties between the United States and the

Sandwich Islands, Mexico, Central America, the Spanish West Indies and San Domingo, it was claimed that the trade between those countries and the United States had been or was likely to be placed on a more favored footing than trade between the United States and the British West Indies. England proposed an extension of Art. II. of its Treaty of July, 1815, to be made applicable to the trade between the United States and the British West Indian colonies.

Mr. Frelinghuysen suggested in answer a Convention for commercial reciprocity expressly providing

> "that the conditional privileges which this convention expressly reserves and confines to the goods and vessels of the respective countries under the national flags are not, under the operation of favored-nation clauses in existing treaties which either of them may have concluded with other countries, to be deemed as extending to the goods or vessels of such other countries without equivalent consideration on the part of such other countries; and if any foreign country should claim, under existing favored-nation engagements, to share in the benefits of the commercial intercourse which this convention creates * * * and should either party deem such claim to be allowable, it is hereby engaged that the party affected thereby shall have the right to denounce the present convention."
>
> Moore, *Id.*, pp. 268–70.

This seems to us another clear indication of the effect of the Most Favored Nation Clause in the view of our Government, constituting such a danger that they decline to make the desired stipulation with Great Britain except upon the condition of its immediate denouncement in the expected event of claims being asserted by other countries under the most favored clauses

In President Cleveland's message of December 8th, 1885, he calls attention to our Treaty of 1883 with Mexico resting on the basis of reciprocal exemption from customs duties and to the fact that other treaties of a like character were initiated with Spain and Santo Domingo. Overtures were then made by Great Britain for a like mutual extension to the commer-

cial intercourse with her West Indian and South American dependencies, and thereupon the treaties with Spain and Santo Domingo, then pending before the Senate, were recalled for further consideration. Among the reasons given by the President for deeming them improvident was this :

> "Moreover embarrassing questions would have arisen under the favored-nation clauses of treaties with other nations."

In 1869 replying to a proposal of the Argentine Government for a Treaty for fixed rates of duty upon articles usually imported from the one country into the other, Mr. Fish says, among other things :

> "Another serious objection is that the United States have treaties with many other governments which would give the latter the right to claim for their productions imported into the United States the same rate of duties as those provided for in the treaty such as you propose. In most instances, therefore, the conclusion of such a treaty with one power would be tantamount to a treaty with all others," etc., etc.
>
> Moore, *Id.*, p. 262.

Reciprocal Stipulations or Advantages as the Basis of the Favored Nation Clause.

We need make no question as to the propriety of the rule invoked that the advantages of the Most Favored Nation Clause cannot be insisted upon unless reciprocal advantages are created in favor of the country upon whom the demand for favorable treatment is made. This as we have seen was invoked by Colombia when she was asked to grant privileges to our vessels in her ports which we concededly did not afford to her vessels in our ports and the want of mutuality or reciprocity was at once made up by presidential proclamation, authorized by Congressional action.

In the present case, however, the stipulations of the Treaty are in terms reciprocal and it seems obvious, as was held by Attorney-General Williams, that no more can be requisite.

The difficulties that have arisen with reference to the character or degree of reciprocity in all the disputes concerning the privileges claimed under the Most Favored Nation Clause have had reference mainly to questions of tariff and it will be seen by an examination of these cases, gathered in Moore's International Digest, Vol. 5, that the discussions have turned upon the difficulty, not to say the impossibility, of a general reciprocity equally applicable to all countries upon questions of export and import. The character of the products differs radically; the importance of the products to the commerce of one or the other country is of essential difference and the stipulations with reference to discrimination or equalization of duties applicable in the one case are almost universally quite inapplicable in another. So that the equivalent which is complete in the Treaty now under discussion is well-nigh impossible of attainment in matters concerning the importation of merchandise.

Mr. Sherman, as Secretary of State, writing to Mr. Buchanan, Minister to the Argentine Republic, January 11, 1898, illustrates this in the following language:

> "The neighborhood of nations, their border interests, their differences of climate, soil, and production, their respective capacity for manufacture, their widely different demands for consumption, the magnitude of the reciprocal markets, are so many conditions which require special treatment. No general tariff can satisfy such demands. It would require a certainty of language which excludes the possibility of doubt to justify the opinion that the government of any commercial nation had annulled its natural right to meet these special conditions by compensatory concessions, or held the right only on condition of extending the same to a nation which had no compensation to offer."
>
> Moore, *Id.*, p. 278.

The Treaty with Hawaii which gave rise to the cases of Bertram vs. Robertson, 122 U. S., 116, and Whitney vs. Robertson, 124 U. S., 190, is an apt and complete illustration of that lack of equivalent which alone can make the Most Favored Nation Clause inapplicable.

The Treaty with Hawaii provoked claims from most of the

countries of Europe as well as from Mexico and Japan, and was the occasion of much diplomatic correspondence before it reached the Supreme Court. By that Treaty the King of the Hawaiian Islands engaged to give advantages to the United States of which it was materially impossible for any other country in the world to furnish an "equivalent." Among other things he covenanted not to "lease or otherwise dispose of or create any lien upon any port, harbour or other territory in his dominions, or grant any special privileges or rights of use therein to any other power, state or government" *(Id.*, p. 263).

No other country could give to the United States the assurance that this strategic point in the Pacific should be free from foreign occupation, and it seems obvious that no Favored Nation Clause in any other Treaty could offset so distinct and unique an advantage, the return for which in a reduction of or freedom from duties was but a small consideration.

These considerations and their importance were recognized by Germany, and so well expressed in the Treaty concluded at Berlin in 1879 that we quote the language of the special article referring thereto:

> "Certain relations of proximity and other considerations having rendered it important to the Hawaiian government to enter into mutual arrangements with the government of the United States of America by a convention concluded at Washington, the 30th day of January, 1875;
>
> "The two High Contracting Parties have agreed that the special advantages granted by said convention to the United States of America, in consideration of equivalent advantages, shall not in any case be invoked in favor of the relations sanctioned between the two High Contracting Parties by the present treaty" (p. 265).

Here was an express waiver of the otherwise automatic operation of the Most Favored Nation Clause.

This view is emphasized by the letter of our Department of State to the Russian Chargé d'Affaires of July 30th, 1895:

> "The exceptional advantages granted to the Hawaiian Islands * * * have been yielded to that

government in return for certain valuable and exclusive considerations and by reason of the peculiar geographical and commercial relations that exist between the two countries. * * *

"As the mutual concessions under the reciprocity treaty between the United States and the Hawaiian Islands are of an exceptional nature, there does not appear to be any present condition leading to a discussion of the question whether the negotiation of this convention has established a precedent to be followed with other countries."

For. Rel. 1895, Vol. 2, p. 1121. Moore Int. Law, Vol. V., pp. 276, 277.

In Bartram vs. Robertson the views of this Court do not differ from the diplomatic views expressed by the Executive Department. We quote from page 121 (122 U. S.):

"It does not appear that Denmark has ever objected to the imposition of duties upon goods from her dominions imported into the United States, because of the exemption from duty of similar goods imported from the Hawaiian Islands, such exemption being in consideration of reciprocal concession, *which she has never proposed to make.*

"Our conclusion is, that the treaty with Denmark does not bind the United States to extend to that country, *without compensation*, privileges which they have conceded to the Hawaiian Islands *in exchange for valuable concessions.* On the contrary, the treaty provides that like compensation shall be given for such special favors."

In Whitney vs. Robertson, the Court followed its earlier decision, and passing upon a like claim, founded upon a Treaty with Santo Domingo, said :

"It is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce, or manufacture of their respective countries, in favor of articles of like character, imported from any other

country. It has no greater extent. It was never designed to prevent special concessions, *upon sufficient considerations*, touching the importation of specific articles into the country of the other."

To conclude, as we have already said in the course of this brief, there is no objection to the principle that the Most Favored Nation Clause must rest upon reciprocal stipulations. In this case it does rest upon absolutely reciprocal stipulations. Whenever an apparent exception has been made to the operation of the Most Favored Nation Clause, it will, we repeat, be found to rest upon concessions which cannot be duplicated and the "equivalent" of which cannot be fairly measured or given. This objection does not hold in the case at bar.

CONCLUSION.

The judgment of the Supreme Court of California should be reversed and the cause remanded with directions to grant letters of administration to the plaintiff in error.

Respectfully submitted this 5th day of December, 1910.

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Addendum.

Since making the foregoing brief the reports of the Foreign Relations for 1907 have appeared. As evidencing the attitude of the Italian Government and their adoption of the interpretation herein invoked of the Most Favored Nation Clause we print the following, containing the substance of a decision by the Court of Cassation, determinative of the attitude of the Italian Government upon this point.

CONSULAR JURISDICTION OVER ESTATES.

File No. 6580/-3.

AMBASSADOR GRISCOM TO THE SECRETARY OF STATE.

[No. 53.]

AMERICAN EMBASSY,
ROME, April 29, 1907.

SIR: I have the honor to send you herewith enclosed a copy, together with a translation, of a decision of some interest by the supreme court of cassation of Rome in a case which arose between Mr. de Castro, consul-general of the United States, and a Mrs. Rebecca Dawes Rose. The circumstances were in brief as follows:

In November, 1904, an American citizen, Mrs. G. I. Johnson, of Cleveland, Ohio, died of pneumonia at Mrs. Dawes Rose's boarding house in the city of Rome, and as Mrs. Johnson's only heirs then in Rome left the city a few days after her death the consul-general assumed the administration of the estate. In the course of settling the claims against the estate the consul-general paid to Mrs. Dawes Rose an item of lire 184, for disinfection of the premises occupied by Mrs. Johnson. Having subsequently been informed that such disinfection was not obligatory and was not prescribed by the sanitary regulations of Rome, and that when disinfection is required it is done by the sanitary authorities at a nominal cost, the consul-general requested Mrs. Dawes

Rose to refund the sum of lire 184 which he had paid her. She refused to comply with the request, and he thereupon cited her before the pretore of the third district of Rome. Without entering into the merits of the case, the pretore held that Mr. de Castro had not acted as consul-general of the United States, but merely as a private agent or attorney of the Johnson heirs. The case was taken before the civil tribunal of Rome and the pretore's judgment was upheld, and the consul-general was ordered to pay the costs. The consul-general thereupon refused to comply with the judgment of the court directing him to pay the costs. At this point in the case the matter was brought to the attention of my predecessor, Mr. White, with a view through his intervention to secure an amicable settlement and to prevent an execution by the court upon the private effects of the consul-general. I inclose for your information a copy of the statement of the case, prepared by the consul-general for Mr. White, and a letter addressed by Mr. White to the consul-general on September 3, 1906. Mr. White was able to arrange with the minister for foreign affairs that no action should be taken by the lawyers of Mrs. Dawes Rose on the writ of execution until the judgment of the court of cassation, to which the case had been appealed, should be rendered.

The judgment of the court of cassation was rendered on the 4th of February last. After reciting the facts the court of cassation takes up the finding of the lower court and "on the first count observes: That the judgment in appeal held that De Castro when he paid Mrs. Rose the 184 lire did not act as consul-general, but as agent of the Johnson heirs, and stated that the agency being void De Castro had no right of action. But the tribunal forgot to state the reasons for which it affirmed the existence of a supposed agency, nor did it give any which in its opinion deprived De Castro from his character of consul when he acted in the interest of the Johnson estate in the absence of the heirs. The tribunal only said that in order to retain his official capacity it was not enough that he should have written on official paper bearing the consular heading and signed with his own due qualification, but the tribunal was not able to designate what other acts, forms or signs should have been necessary in order that his diplomatic qualification be considered as superseding that

of any private individual in making his demand and in his asked for intervention in the affairs of the Johnson estate. It was necessary to bear in mind that Mrs. Johnson died intestate and that her heirs were not only her two children present at her death, but also the husband and two other children absent from Rome, and also that the former left Rome two days after the death.

"The judgment is therefore defective for the two reasons above stated.

"Upon the second finding the court observes: That the tribunal has erroneously defined the capacity of Consul de Castro declaring him a private attorney. The American consul paid the amount not due to Mrs. Rose when none of the Johnson heirs were in Rome (that is, two days after their departure) and the consul paid as consul representing the Johnson estate; he paid as administrator of affairs and not as an attorney of private individuals or as a private individual, not as a third party, but as the true and legitimate representative of the persons interested by virtue of the capacity inherent to his consular office; therefore as such and as *gestor negotiorum* recognized by the conventions, he paid 184 lire not due to Mrs. Dawes. He holds, therefore, the *conditio indebti*—and even though at the time of their departure two of the five Johnson heirs told Mrs. Dawes that she might apply to the consul for the settlement of her claims, they did not by that appoint De Castro as their private attorney, but as the legal representative of the estate—and as such, indeed, he intervened, and it is not presumable that he divested himself of his quality precisely when he had to carry out acts inherent to his legal functions and comprised in the sphere of his office.

"In regard to the third finding, it is observed that the fundamental error of the judgment lies in having denied that the consul-general had, by virtue of the law and the treaties, the power to bring before an Italian magistrate, and without special power from the heirs, an action for the recovery of an undue payment interesting the estate, said action being directed to re-establish the integrity of the estate as it was left.

"The judgment miscomprehended the consular convention established between the United States of America and Italy in

1878, securing for the contracting parties the treatment of the most favored nation and empowering by right the consuls to represent judicially in certain cases the estates of their respective citizens, whether one considers France by her convention of July 26, 1862, or Russia by her convention of April, 1875, to be the most-favored nation. It is a fact that by virtue of article 9 the powers of the consuls are established as follows: (*a*) To place and remove seals; (*b*) to prepare inventories; (*c*) sell perishable goods; (*d*) to care for and deposit funds and incomes of the estate; (*e*) to ascertain, to collect, and to settle claims; (*f*) to administer and to represent also judicially the estate; and to this effect the convention adds:

In all questions arising from the publication, administration and liquidation of estates of citizens of one of the two countries in the other the respective consul-generals, consuls and vice-consuls will represent by full right the heirs and shall be recognized officially as their attorneys without being obliged to justify their mandate by a special power.

They may consequently appear in person or by attorneys, chosen among such as are so authorized by the legislation of the country, before the competent authorities, to take charge in every case concerning the estate, of the interest of the heirs, by prosecuting their rights or answering the claims against them.

"From these words the understanding clearly arises that when the succession of a foreigner is opened in Italy it is the consular representative of the foreign nation itself who undertakes for him to do everything, and not only to administer his property but to liquidate it in order to be able to hand it over to the heirs within a period of time of not less than six months. This is the scope of power which the national law assumes toward its own citizens, and this is the scope of power delegated by the nation in its turn to its consular agents.

"For this reason it is obvious that the consul during the period of liquidation may also bring an action for the recovery of unlawful payments. From the moment that he is the administrator and the legal representative of the estate in Italy, in the absence of heirs and in cases contemplated by the conventions, it follows that judicially in him

resides the *universum ius* and that during that period he may, or should, bring any action in Italy interesting the heirs.

"Whereas by these arguments it appears useless to examine the last motive the judgment must be annulled, and so it is decided."

I have, etc.,

LLOYD C. GRISCOM.

(Inclosure—Translation)

Facts.

At the end of 1904 a Mrs. G. I. Johnson, an American citizen, located in Rome, with two of her children, at a pension kept by a Mrs. Dawes Rose. On the 25th of January, 1905, Mrs. Johnson died from pneumonia, and two days later Mrs. Dawes presented to the son of the deceased a bill made out to his name and including board and disinfection of the room, disinfection amounting, it was claimed, to 184 lire.

Mr. de Castro, consul-general of the United States, by letter of January 28, 1905, sent to Mrs. Dawes 579 lire, the aggregate amount of the bill of Mr. Johnson's. Having ascertained, however, from the health office that no disinfection had been applied for nor had been made by said office, and that such disinfection was not compulsory in view of the disease, he cited Mrs. Dawes before the royal pretore of the third district of Rome demanding restitution of the 184 lire paid by mistake, and he offered to prove that said sum had been demanded from him by Mrs. Dawes as representative of the Johnson heirs. Mrs. Dawes objected that the matter was a private one of Mr. Johnson's and not one concerning the estate of the deceased, and that consequently the consular convention could not be properly applied to the case; even though Mr. de Castro when paying had exercised his official function his powers were at an end and the claim of repayment should be made, if at all, by the Johnson heirs or by a duly empowered attorney; finally, that the present case was one of those contemplated by the conventions. So much for lack of right of action. As to the merits, the demands of de Castro were said to be without foundation.

(Foreign Relations for the United States, Part II., p. 750).

Appendix A.

IN RE WYMAN.

(SUPREME JUDICIAL COURT OF MASSACHUSETTS, MIDDLESEX, MARCH 10, 1908.)

1. EXECUTORS AND ADMINISTRATORS—ADMINISTRATOR OF RUSSIAN SUBJECT—RIGHT TO APPOINTMENT.

The treaty of December 6–18, 1832, between Russia and the United States (8 Stat., 448) by article 8 provided that the two contracting parties should have the liberty of having in their respective ports consuls, vice consuls, agents and commissaries of their own appointment, who shall enjoy the same privileges and powers of the most favored nation. Article 10 provides that the representatives of each of the high contracting parties, being citizens or subjects of the other party, shall succeed to the personal goods of their subjects, whether by testament or *ab intestato*, and may take possession thereof, either by themselves or by others acting for them. Under the "most favored nation clause" reliance was had by petitioner on the provisions of the treaty of July 10, 1853, between the Argentine Republic and the United States (10 Stat., 1001), which provides that, if any citizen of either of the two contracting parties shall die without will or testament in any of the territory of the other, the consul general or consul of the nation to which the deceased belonged, or the representative of such consul general or consul, shall have the right to intervene in the possession, administration and liquidation of the estate of the deceased. Held, that on the death of a Russian subject dying here intestate and leaving personal property, the Russian vice consul was entitled to be appointed administrator of the estate, to the exclusion of the public administrator.

2. TREATIES—CONSTRUCTION.

Treaties are to be liberally construed.

(Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Treaties, Sect. 7).

3. SAME—CONFLICT BETWEEN TREATY AND CONSTITUTION OR LAWS OF STATE.

Under Const. U. S., art. 6, declaring that all treaties made under authority of the United States shall be the supreme law of the land and the judges in every State shall be bound thereby, when anything in the Constitution or laws of a state is in conflict with a treaty, the latter must prevail.

(Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Treaties, Sect. 11).

4. SAME—POWER TO MAKE.

Under Const. U. S., art. 2, sect. 2, providing that the President shall have power, by and with the advice and consent of the Senate, to make treaties, the treaty of December 6–18, 1832 (8 Stat. 448), between Russia and the United States, and the treaty of July 10, 1853, between the Argentine Republic and the United States (10 Stat. 1001), under which consuls and vice-consuls of such countries are entitled to appointment as administrators of the estates of citizens of such countries to the exclusion of public administrators, were within the jurisdiction of the treaty-making power.

(Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Treaties, Sect. 2).

5. EXECUTORS AND ADMINISTRATORS—BOND ON APPOINTMENT OF VICE-CONSUL.

When a vice-consul is appointed administrator of a citizen of a foreign country represented by such vice-consul he should be required to give a bond as required in other cases.

(Ed. Note.—For cases in point, see vol. 22 Cent. Dig. Executors and Administrators, Sects. 158–170.)

Appeal from Probate Court, Middlesex County.

Petition of Charles F. Wyman, Russian vice-consul, for appointment as administrator of the estate of Julius Saposnik. From a decree dismissing the petition, petitioner appeals on an agreed statement of facts. Reversed.

Frederic B. Greenhalge, for public administrator. Frederic R. Coudert and John H. Appleton, for appellant.

LATHROP, J. On the agreed facts in this case we have no doubt that the judge of the probate court erred in appointing a public administrator as administrator of the estate of a Russian subject dying here intestate and leaving personal property, and in dismissing the petition of the Russian vice-

consul on the ground that it did not appear that he had a legal right to be appointed administrator of the estate to the exclusion of the public administrator.

By article 8 of the treaty of December 6–18, 1832 (8 Stat., 448), between Russia and the United States, it was provided: "That two contracting parties shall have the liberty of having in their respective ports consuls, vice-consuls, agents and commissaries of their own appointment, who shall enjoy the same privileges and powers of the most favored nations." The same treaty in article 10 provides: "The citizens and subjects of each of the high contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation or otherwise, and their representatives, being citizens or subjects of the other party shall succeed to their said personal goods, whether by testament or *ab intestato*, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases."

Under the most favored nation clause reliance is had upon the provisions of the treaty of July 10, 1853, between the Argentine Republic and the United States (10 Stat., 1001), which read as follows: "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul general or consul of the nation to which the deceased belonged or the representative of such consul general or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." See, also, article 8 of the treaty between Costa Rica and the United States of July 10, 1851 (10 Stat., 921).

There is but little authority directly in point, on the question raised by the appeal. In Lanfear vs. Ritchie, 9 La. Ann., 96, decided in 1854, the decision was against the vice consul of Sweden and Norway, on the ground that the right claimed was "incompatible with the sovereignty of the state." But this was at a time when we might expect the doctrine of state rights to be strongly insisted upon. On the other hand,

there are two decisions in the Surrogates' Court for Westchester County, N. Y., which fully sustain the position of the vice-consul in the case before us. These cases are well considered and cover the entire ground. Estate of Tartaglio, 12 Misc. Rep., 245, 33 N. Y. Supp., 1121; *In re* Fattosini, 33 Misc. Rep. 18, 67 N. Y. Supp., 1119. None of these cases are binding upon us, and the case must be decided on general principles.

Among the powers conferred upon the President by article 2, Sect. 2, of the Constitution of the United States is this: "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." By article 6 it is declared: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Treaties are to be liberally construed (Shanks vs. Dupont, 3 Pet., 242, 249, 7 L. Ed., 666; Hauenstein vs. Lynham, 100 U. S., 483, 487, 25 L. Ed. 628. When, then, anything in the Constitution or laws of a state are in conflict with the treaty, the latter must prevail, and this court has not hesitated to follow this rule, which is generally recognized as the law of the land. Tellefsen v. Fee, 168 Mass., 188; 46 N. E., 562; 45 L. R. A., 481; 60 Am. St. Rep., 379; Ware v. Hylton, 3 Dall., 199, 237, 1 L. Ed., 568; United States v. Forty-three Gallons of Whisky, 93 U. S., 188, 197, 28 L. Ed., 846; Hauenstein v. Lynham, 100 U. S., 483, 489, 25 L. Ed., 628; the Head Money Cases, 112 U. S., 580, 598; 5 Sup. Ct., 247; 28 L. Ed., 798, per MILLER, J.; Geofroy v. Riggs, 133 U. S., 258, 267, 10 Sup. Ct., 295; 33 L. Ed., 642; *In re* Parrott (C. C.), 1 Fed., 481.

"While it may be true that there is some limit to the powers of the President and Senate in making treaties, as has been intimated in some of the cases in the Supreme Court of the United States, we cannot accede to the contention of the counsel of the public administrator, that the treaties in question in this case are beyond the jurisdiction of the treaty making power; nor can we accede to the further contention as

to the construction of the treaty which was adopted by the judge of the probate court." We might perhaps stop here, but as the question of giving a bond is sure to arise, we are of opinion that the vice-consul, as he has applied for letters of administration, and thus has submitted himself to the court, should be required to give a bond, and in other respects to conduct himself with respect to the estate as would any other administrator.

The order, therefore, will be: Decrees of the probate court reversed.

Appendix B.

SILKMAN, S. The Consul-General of Italy applies to this court for a decree under section 2709 of the Code, directing the Union Savings Bank of Westchester to turn over to him for the purpose of administration and payment of debts and export of the surplus of the next of kin, who are subjects of the Kingdom of Italy, certain moneys in the possession of said bank belonging to the decedent, an Italian subject who died in this country intestate.

No answer is filed and the facts are admitted.

The application would be granted upon the authority of Matter of Fattosini, decided by this court (33 Misc. Rep., 18) without comment, were it not for the decision of Surrogate THOMAS in Matter of Logiorato, 34 Misc. Rep., 31, in which he questions the correctness of the decision of this court in the former case.

The great respect in which the opinions of the learned Surrogate of New York County are held, compels this court to review the question as to the authority of the Consul-General of Italy under treaty provisions and under the law of nations to make this application.

It was held by this Court, in the Fattosini case, that the consular and commercial treaties between the United States and the Kingdom of Italy, by virtue of the "most favored nation" clause of the Commercial Treaty of 1871, embraced

the privileges granted by the ninth article of the treaty between the United States and the Argentine Republic, and gave the Consul-General of Italy the paramount right to take possession of and administer the estates of Italian subjects dying intestate within his consular jurisdiction.

Article nine of the treaty with the Argentine Republic is in this language: "If any citizen of the two contracting parties shall die without will or testament in any of the territories of the other, the Consul-General or consul of the nation to which the deceased belonged, or the representatives of such Consul-General or consul in his absence shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

Surrogate THOMAS says in respect of this provision: "It will be observed that the right assured to the Consul General is to 'intervene,' and this intervention is to be 'conformably with the laws of the country.' To intervene is 'to come between,' (Webster's Dict.), and the right to intervene in a judicial proceeding is a right to be heard with others who may assert demands or defences. It is not a right to take possession of the entire corpus of a fund which is the subject of the proceeding. A right to intervene 'conformably with the laws' of the State of New York is something different from a right to set aside the laws of the State and take from a person who, by those laws is the officer intrusted with the administration of estates of persons domiciled here, and who leave no next of kin within the jurisdiction, the right and duty of administering their assets."

In considering the conclusions of the learned surrogate, we must determine whether the interpretation given by him to the word "intervene" is not too restricted. He gives to it only that meaning which it has under the State law relating to State practice—to come in and be heard. He does not give to it its full meaning in its ordinary sense. To intervene is to come between, "and to be heard" is added to the definition only by local legal signification and usage. It is true that in the interpretation of treaties, the same general rules are adopted which apply to the construction of statutes, contracts and written instruments generally, in order to effect

the purpose and intention of the makers. (Wilson vs. Wall, 6 Wall., 83; United States vs. Rauscher, 119 U. S., 407).

Nevertheless there is this difference, that the language of treaties in most instances, as it comes for interpretation or construction, is but a translation from a foreign tongue, and there would be great danger of violating the spirit of such an instrument were we to bear too heavily upon the local technical definition and use of a word (see United States vs. Percheman, 7 Pet., 51).

When a treaty admits of two constructions, one restrictive of the rights that may be claimed under it, and the other liberal, the latter is to be preferred (Shanks vs. Dupont, 3 Pet., 242; Hauenstein vs. Lynham, 100 U. S., 483).

Treaties may be construed on the principle of instruments *in pari materia* (Shanks vs. Dupont, 3 Pet., 255).

And it would seem a proper application of this principle to look into the legislation of the high contracting parties upon the subject, as well as to look to what view the executive branches of the government have taken, for if they have already interpreted, courts will not set up to the contrary (Foster vs. Neilson, 2 Pet., 253).

That treaties should be interpreted in case of doubt according to the tendency of international law, commends itself as a reasonable legal proposition.

Therefore looking at the laws of the governments, parties to the treaty, not because they control in respect to the matter before us, but as a guide only to the spirit and meaning of the treaty under consideration, we find the following provision in the United States Revised Statutes, section 1709:

"SEC. 1709. It shall be the duty of consuls and vice-consuls where the laws of the country permit:

"FIRST. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representatives, partner in trade, or trustee by him appointed to take care of his effects.

"SECOND. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

"THIRD. To collect the debts due the deceased in the

country where he died, and pay the debts due from his estate which he shall have there contracted.

"FOURTH. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

"FIFTH. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings."

And in the laws of the Kingdom of Italy relating to the functions and attributes of consuls, this provision: "Article XXV. In the event of the death of an Italian, the Consuls can execute all and any kind of deeds of protection, release, or administration in the interests of the deceased or his estate."

In Wheaton's International Law, page 175, the principle is laid down "The Consuls have authority and power to administer on the estates of their fellow-subjects deceased within their territorial consulate."

In the Matter of Parsons, deceased, Secretary of State Marcy, in 1855, writing officially to Mr. Aspinwall, Consul General at London, says: "The consuls of the United States are authorized and requested to act as administrators on the estates of all citizens of the United States dying intestate in foreign countries and leaving no legal representative or partner in trade. Indeed, this is one of the most sacred and responsible trusts imposed by their office, and in this respect they directly represent their Government in protecting the rights and interests of the representatives of deceased citizens. The Consul of the United States, therefore, was the only person who could legally touch the property left by the deceased Parsons; it was his duty to deposit the proceeds thereof in the Treasury of the United States, there to await the decision of the proper authorities as to its final disposition." Wharton Inter. Law Dig., 782.

In the Matter of Chadwick, deceased, arising in 1875, Mr. Cadwalader, acting Secretary of State, representing his Gov-

ernment writes: "In the case of American Citizens dying abroad, it is made by law the duty of the United States Consul within whose jurisdiction such death occurs, to take charge of the effects of the deceased, cause an inventory of such effects to be taken, and dispose of any that may be deemed perishable by sale at public auction, and the proceeds of which, together with all other property and moneys of the deceased, he is to hold subject to the demand of the legal representatives of the deceased. In case such representatives do not appear and demand the estate within a year, the Consul is required to transmit the effects to the Treasury Department, there to await final distribution to the parties entitled to receive them."

And again the same distinguished lawyer, writing officially, says: "When a citizen of the United States, not a seaman, dies abroad without leaving a will, it is made the duty of a consul to take charge of any property he may leave in the consular district, and after paying the debts of the deceased contracted there, to send the proceeds of the property at the expiration of a year to the Treasury of the United States, there to be held in trust for the legal representative. In case, however, a legal representative shall appear and demand the effects, the consul is required to deliver the property to him, after deducting the lawful fees. The statute on this subject may be found in section 1709 of the Revised Statutes of the United States."

Cushing, Attorney General, in 1856, held that consuls under the United States law, in the absence of treaty authority could not intervene as of right in the administration of a decedent's estate except by way of surveillance (8 Op., 98, Cushing; Whart. Inter. Law Dig., 784, 785).

Attorney General Black held that the United States was not bound by treaty with Peru to pay a consul of that country the value of property, belonging to a deceased Peruvian, which the consul was entitled to administer, but which had been unjustly detained and administered by a local public administrator, and that the remedy of the consul was in the courts. 9 Op., 383, Black, 1859.

While United States statutes are to be considered, in arriving at the spirit and intention of a treaty I apprehend that State statutes are not so entitled. State legislatures are only remotely connected with the treaty making power, and their

right to negotiate treaties is expressly prohibited by the Federal Constitution. "All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Const., art. VI., § 2. This plain language compels the elimination of all consideration of state laws while in the business of construing a treaty. State law must yield and adjust itself to the spirit and intent of a treaty. Ware vs. Hylton, 3 Dall., 199; Hauenstein vs. Lynham, 100 U. S., 483; Matter of Parrott, 1 Fed. Repr., 481.

Federal laws and treaties must be read together and reconciled if possible (Chew Heong vs. United States, 112 U. S., 536; Taylor vs. Morton, 2 Curt., 454-457; Ropes vs. Clinch, 8 Blatchf., 309).

It in no sense follows that treaties and State statutes are to be reconciled. If that were attempted there might have to be as many reconcilements as there are States in the Union.

I find no federal authority wherein the possibility that the exercise of privileges or prerogatives under a treaty might interfere with the provisions of state statutes, or practice, has been even discussed. And other than the Louisiana case cited by Surrogate THOMAS, and another Louisiana case to which I shall later refer, I find no State authorities. On the contrary, I find that the United States was compelled to pay the loss awarded by international arbitrators where the Surrogate of New York County, in violation of the treaty with Peru, failed to award administration to the Peruvian consul, but gave it instead to the public administrator (Matter of Virgil, 4 Moore Inter. Arb., 390).

The Peruvian treaty provided: "That in the absence of the legal heirs or representatives, the consuls or vice-consuls of either party shall be *ex officio* the executors or administrators of the citizens of their nation who may die within their consular jurisdiction."

I quote from the unanimous decision of the four arbitrators:

"In the month of May, 1857, the Peruvian citizen Jean del Carmen Vergil, returning from New York to the Pacific, died on board the steamer 'Empire City.' The agents of the company to which that steamer belonged placed his personal

effects in the hands of the 'Public Administrator of the City of New York.'

"The Minister of Peru in the United States, in July of the same year, represented to the Secretary of State that the Peruvian Consul in the same city had made proper representation to entitle him to the charge of these effects under existing treaty stipulations, but that, failing to secure the rights therein guaranteed to him, it was necessary to interpose diplomatic offices.

"The Secretary of State immediately instructed the law officer of the government of the United States in the city of New York 'to take such steps as would secure compliance with the provisions of the treaty.'

"The conflicting claims of the public administrator and of the consul of Peru appear to have been heard before the Surrogate's Court of New York, at different times up to the 2d of December, 1858, after which no record is found of further judicial investigation, although it continued to be the subject of diplomatic correspondence up to December, 1862.

"When the attention of the Secretary of State (Mr. Cass) was first invited to this case, no objection was presented to the views expressed by Mr. Osma in reference to the Peruvian Consul's right to take possession of Vergil's property under the treaty of 26th July, 1851; so far from it, it will have been observed, that prompt measures were taken to secure the observance of the stipulations of the thirty-ninth article of that treaty.

"When it had become evident that the proceedings were unsuccessful, the question was referred to the Attorney-General of the United States 'for his opinion as to the requisite measures to be pursued, in order to give effect to the stipulations of the treaty.'

"That officer declared that the detaining of the goods of the deceased from the Peruvian consul was unlawful and a wrong which may justly be complained of. He thought, however, that the Peruvian consul and minister were in fault in endeavoring to obtain 'redress where there is no authority to furnish it,' and he added, that the judicial authorities would have given them this justice 'for the asking.'

"Dismissing any further question upon the principles involved in this claim, in regard to which there is no disagree-

ment among the commissioners, it remains only to arrive at a just measure of the value of Vergil's effects as they were delivered to the Public Administrator and claimed by the Consul of Peru."

While the forms of expression in the numerous treaties of the United States widely differ, nevertheless, governments in their negotiations acted according to well defined principles and had in view specific objects, and although the language varies in the different treaties, the privileges and prerogatives given and obtained in respect to the same subject, are in furtherance of the same common principle and object. So where provisions are found in one treaty of doubtful import, we are entitled to look to the provisions of treaties with other nations on the same subject which are free from doubt, or which, having been construed will aid us in determining the true spirit and meaning of that which is in doubt.

It is true that in Aspinwall vs. Queens Proctor, 2 Curt., 241, decided in 1839, the English prerogative court held contrary to the view of international law for which I contend. This case was decided at a period when that clause of the treaty between England and Spain, which gave to their respective consuls the right to administer upon the estates of their country's subjects, was being freely violated by both parties. It was also before the policy of the nations in respect to the authority of consuls had taken form so as to become a necessary part of the reciprocal relations between nations, and Parliament had not by act at this time adopted a policy as had the United States.

The position taken by the English judge was in direct conflict with the opinion of Secretary Marcy above referred to, and I believe in conflict with the present interpretation of international law by all continental Europe.

In this country I find but one published authority other than that of Surrogate THOMAS agreeing with the English view, and that is the case of Landfear vs. Richie, 9 La. Ann., 96, in which case the court, in an opinion of but a few lines, asserts the sovereignty of the State and denies the right of federal authorities to interfere in probate matters. This case as an authority suffered severely in the early sixties, and it seems now of more than doubtful authority since the decision of the Supreme Court of Louisiana in Succession of Rabasse, 47 La.

Ann., 1454, decided in June, 1895, reversing the Civil District Court (the Court of Probate) and holding that the provisions of the treaty with Belgium, the stipulations of which were applicable to France, giving the consul the right to appear personally or by delegate in all proceedings in behalf of absent or minor heirs, repealed the authority given by law to the Probate Judge to appoint counsel or guardian *ad litem* to absent heirs. In this case there was a will, and an executor, and the right to administer did not arise.

Judge ELLIS of the Civil District Court, whose decision was reversed, took much the same view as is taken by the surrogate in the Logiorato case upon the subject of state authority. He said, referring to the treaty provision: "I do not understand that its object or its effect was or is to strike down the authority or jurisdiction of the local probate tribunal, and to substitute therefor in the contingency named, the power and authority of a resident consul to be by him exercised personally or by a selected delegate. In this succession, during the progress of its settlement, should the Consul of France or his delegate find it necessary to appear in behalf of absent or minor heirs domiciled in France, the treaty stipulation which confers judicial standing *quoad hoc* on the consul or his delegate, would be respected within the limits of the contingencies named in said treaty, but as a Probate Judge holding my authority from a sovereign state of the Union, I do not recognize the right or power of the consul either to take charge of the administration personally, or by delegate, nor his right to indicate what member of the bar I shall appoint to represent the absent heirs of the deceased. The property of the succession is all here, the deceased lived and died domiciled here. There may be domestic creditors, or domestic heirs legal or instituted. Our state laws provide fully for the protection of the interests of non-resident parties, and the succession is in the hands of a Dative Testamentary executor. I hardly deem it worth while to refer to the constitutional right of the Government of the United States to regulate probate matters, or the settlement of succession in the several states of the Union. There can be under our system of federal government no such things as federal probate jurisdiction within any of the states, *i. e.*, outside of the district of Columbia and the several territories. The probate jurisdiction was not conferred by the

people in their constitution upon the general government, and *ergo*, it was reserved by the States and the people thereof respectively.

"It would not be in the power of the general government to withdraw this authority from the states or any of them, by means of a treaty with a foreign government, and therefore to construe the XVth Article of said treaty as is here contended by the representative of the consul of France, would be to announce its indirect nullity, because notative of our federal constitution. I do not so construe it; it is a useful and beneficial provision and will be respected in its letter and spirit whenever the occasion arises to which it has application. I do not assume, nor can I, that it has ever been the intention of the high contracting powers to such treaty that the consuls of either should have any other powers *quoad* the matters referred to in said Article XV. than those of full capacity to appear and obtain from the local Probate Courts the necessary processes for the provisional care, protection and preservation of the minor heirs of property of their countrymen dying abroad under the conditions stated in said Article."

The Supreme Court of Louisiana, in reversing the Civil District Court, say: "If the treaty is susceptible of the construction of the appellant the result will be to avoid the appointment of an attorney for the absent heirs and require the recognition of the appellant as the delegate of the French Consul. In our view, the stipulation in this treaty puts the delegate in the position of an agent of the French heirs, with the same effect as if he held their mandate to represent them as heirs. That was the manifest purpose, and the language of the treaty plainly expresses that intention.

"There is no power to appoint an attorney for absent heirs when the heirs are present and represented. * * * It is idle to call in question the competency of the treaty making power, nor do we think any question can be raised that the subject of this treaty under discussion here is properly within the scope of the power. That subject is the right of French subjects to be represented here by the consul of their country. On that subject the treaty provision is plain. The treaty, by the organic law, is the supreme law of the land, binding all courts, state and federal. * * * The treaty discloses no purpose to require our courts to appoint as the attorney for

absent heirs the delegate of the French Consul. Its purpose is accomplished by placing the delegate before the Court as representing the absent heirs, and *precluding* the appointment of any attorney to represent them."

Having discussed the principles of the interpretation and construction of treaties at some length, let us look at the particular language before us.

Consuls are given the right to intervene "in the possession." We must give this form of expression some weight and some effect. It would seem that the only intelligent construction would be that the consul had the right to come between the property and the possession by some one else than himself, with the result that possession must necessarily be landed in him. To intervene in the administration is secondary; he first comes into possession, and then he comes between the administration and the person who might have a right thereto under state law. This is giving to the word "intervene" its ordinary definition and avoiding its local legal significance.

Endeavoring to ascertain the spirit and intention of the language "to intervene in the possession, administration and judicial liquidation of the estate of the deceased," we must have regard for the entire context and we may not select a single word for definition.

It must not be viewed as would a New York statute, from our own local standpoint. It must be borne in mind that there can be but one correct construction of a contract; therefore, as we construe, so must the authorities of Italy, consequently we must view it from the Italian, as well as our own standpoint, and from both see what was intended to be accomplished by the use of the words quoted.

This can be done in no better way than by studying the policy of Italian law on the subject, and at the same time realizing that the estates of foreign subjects are to be distributed according to the law of their own country, and not ours, and in such distribution the consul is more competent to execute the laws of his country, of which he must be presumed to have particular knowledge, while our courts, on the contrary, are not presumed to be learned in foreign laws, and cannot take judicial notice of them.

If the words "conformably with the laws of the country

for the benefit of the creditors and legal heirs " relate to rights and not to procedure, then the estate of a foreign subject would have to be distributed in accordance with our state Statutes of Distribution. This certainly could not have been the intention of the contracting powers. They could not have intended to take from their own subjects the rights which they would have enjoyed had their intestate died at home, and to permit them to share according to a foreign statute of distribution.

The right that is given by the treaty is the possession and paramount right of administration, and this is not limited by the words " conformably with the laws of the country for the benefit of the creditors and legal heirs."

These latter words provide merely for the procedure. The consul, having been given the right of possession, is then required to administer the estate in conformity with the local laws in reference to such matters. This interpretation gives full protection to the domestic creditors, and that is all that the policy of the State law demands. The desire of State courts is to protect resident creditors, and after that is done they have no further concern, except to deliver the property into the hands of the officers of the State to which it properly belongs.

There is no principle known to American law requiring our courts to protect foreign subjects against the claims of duly accredited representatives of their own government.

I am satisfied that both under a fair interpretation of the treaty provisions as well as under the general law of nations, as recognized by the United States, the Italian Consul is entitled to the possession for the purposes of administration of the property of all Italian subjects dying intestate within his consular jurisdiction.

Decree accordingly.

Matter of Lobrasciano, 38 Misc. N. Y., 415-427.

Supreme Court of the United States

October Term, 1910.

No. 561.

In the Matter of the Estate of
GUISEPPE GHIO, Deceased.
SALVATORE L. ROCCA (Consul General of the Kingdom of Italy),
Plaintiff in Error,
GEORGE F. THOMPSON,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

In the treaty between the United States and the Argentine Republic, of 1853, the following provision occurs:

> "If any citizen of either of the two contracting parties shall die without will or testament in any of the territories of the other, the consul general or consul of the nation to which the deceased belonged, or the representative of such consul general or consul in his absence, shall have the right

> in *intervene* in the possession, administration and judicial liquidation of the estate of the deceased, *conformably with the laws of the country*, for the benefit of the creditors and legal heirs."

In the treaty of 1878 between the United States and Italy, there is a provision that the consular officers of the two contracting powers shall have all the rights, privileges and immunities granted to the consular officers of "the most favored nation".

The Italian Consul General, plaintiff in error herein, contends, first, that the treaty with the Argentine Republic gives consuls of that Republic a right to letters of administration on the estates of their nationals dying in the United States, in preference to the public administrator, or any other heir, resident within the United States, and, second, that, under the "most favored nation" clause in the treaty with Italy, Italian consular officers are entitled to letters of administration in similar cases by virtue of the grant of that privilege to Argentine consuls.

Defendant in error, on the other hand, contends,

FIRST, that the language of the Argentine treaty does not give to Argentine consuls the right to letters of administration in any case;

SECOND, that if the Argentine treaty did give such a right to Argentine consuls, it was in consideration of reciprocal concessions between the United States and the Argentine Republic, and the Italian consular officers are not entitled to claim such rights under the "most favored nation" clause because Italy has not paid

the price that the Argentine Republic has paid for the privilege;

THIRD, that the treaty-making power of the federal government has no authority under the Constitution in any event to provide by treaty that letters of administration shall be given to consular officers or other persons in derogation of the State law on the subject.

The argument of the plaintiff in error rests almost exclusively on the authority of

In re Wyman, 191 Mass. 276, 77 N. E. 379, 114 A. S. R. 601.

And on two decisions of the Surrogate's Court of Westchester County, New York, viz.:

Estate of Fattosini, 67 N. Y. Supp. 1119;
Estate of Lobrasciano, 77 N. Y. Supp. 1040.

In these cases, which appear to have been inadequately argued on the public administrator's side, and in which many of the points raised in the case at bar were not discussed by the courts in their several opinions, letters were issued to a consul in preference to a public administrator.

Flatly at variance with these authorities are the cases of

Lanfear vs. *Ritchie*, 9 La. Ann. 96, and
Estate of Logiorato, 69 N. Y. Supp. 1040.

I.

The Treaty With the Argentine Republic Does Not Give to Consular Officers of Either Nation the

Right to Letters of Administration in Any Case.

The language of the treaty with the Argentine Republic on which the Consul General of Italy relies is:

> "If any citizen of either of the two contracting parties shall die without will or testament in any of the territories of the other, the consul general or consul of the nation to which the deceased belonged, or the representative of such consul general or consul in his absence, shall have the right to *intervene* in the possession, administration and judicial liquidation of the estate of the deceased, *conformably with the laws of the country*, for the benefit of the creditors and legal heirs."

If the Italian Consul General's interpretation of the treaty is sound, it is clear that he is entitled to letters of administration not only prior to the public administrator but prior also to the resident heirs, next of kin, and creditors. The language of the treaty gives the consul the right to "intervene" in all cases of intestacy, whether or not there be heirs on the ground. True, the Consul General has chosen for a test case, in which to urge his claim under the treaty, an estate in which the public administrator is the only contesting applicant for letters, but a decision against the public administrator in this case would necessarily be an authority against the claim of a parent, a widow or a child in other cases. The Consul General claims the right as against the nearest of blood and a decision in his favor in this case would confirm that claim. It is not to be presumed that the Consul General and his successors in office would sleep on their rights.

Naturally, an American Court will not recognize a claim so repugnant to the general policy of our law unless it clearly appears not only that the two powers which were parties to the treaty intended but also that the American federal government had the authority to confer such extraordinary privileges on consular officers.

The treaty does not grant expressly the right to administer on estates. It grants only the right to "intervene" in the possession, administration and judicial liquidation. On the meaning given to "intervene" in this connection, therefore, depends largely the interpretation of the treaty clause which is here under discussion.

The word "intervene" has a clearly defined meaning in both the English and the Civil Law, which is the law of the Argentine Republic. Indeed, the word was imported from the Civil into the English law. The use of "intervene" presupposes an administration in progress: that is, an administrator previously appointed.

> "Intervention is the act or proceeding by which one on his own motion becomes a party to a suit pending between others".
>
> Anderson's Law Dictionary, title "Intervention".

> "Intervene: To interpose in a law suit, so as to become a party".
>
> English Law Dictionary, title "Intervene".

> "Intervention: The act of admitting a third party to a suit to enable him to protect some interest which might otherwise be affected".
>
> English Law Dictionary.

"Intervene: To file a claim or a defense in a suit instituted by or against others".

Anderson's Law Dictionary.

"Intervention (Lat. intervenio, to come between or among). The admission, by leave of Court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings".

Bouvier's Law Dictionary.

In Civil Law:

"An act by which a third party becomes a party in a suit pending between other persons".

Pothier Proc. Civ. 1 ere part, Ch. 2, S. B. Sec. 3—cited by Bouvier.

Cabel Cushing, Atorney-General of the United States, in a letter to Mr. Cavalcante d'Albuquerque, Envoy of the Emperor of Brazil (8 Opinions of Atty.-Genl. 99) defines the meaning of "intervene" in international law.

It will be noted that Mr. Cushing's opinion was written in 1856, three years after the treaty between the Argentine Republic and the United States had been concluded. Mr. Cushing, in his opinion, frequently refers to the right of consuls "to intervene". Thus on page 99, he says:

"the administration of the estate of a foreign decedent is primarily a question of the local jurisdiction, and his consul can *intervene* only so far as the local law may permit".

Again, in the same opinion, on page 99, Mr. Cushing says:

> "In all these cases, the consul of the decedent's country has no jurisdiction; he may *intervene* by way of advice or in the sense of surveillance but not otherwise as consul and of right. Thus, if the decedent, being a foreigner, leaves in the State a minor heir, the consul of his country may *intervene* to see that he have a proper guardian to secure his interests in the succession".

The Court will observe that Mr. Cushing in referring to the rights of consuls to "intervene" gives to the word exactly the same meaning that we contend should be given to it in the treaty with the Argentine Republic, *i. e.*, that the consul "may intervene by way of advice, or in the sense of surveillance".

It must be assumed that the word "intervene" was not ignorantly or carelessly used in the treaty.

As the Court said in the case of *The Neck*, 138 Fed. 144:

> "International treaties are usually, if not invariably, prepared with great care by men of learning and experience, accustomed to select words apt to express precisely and fully the intention of the contracting parties. Therefore, a reasonable, rather than a liberal, construction must be given to agreements solemnly entered into by nations; and there is no authority for reading into an international treaty, under guise of construction, extraordinary provisions not necessary to give full effect to the intention expressed."

Certainly a Court will demand that the language of a treaty be made very clear indeed before it will acknowledge the right of a Consul General, whose consular district includes California, Nevada, Oregon and Washington, to administer, in preference to the claim and regardless of the convenience of heirs and creditors, on the estates of aliens of his country, dying within his wide jurisdiction; a jurisdiction so wide that the offices of the Consul General in the majority of such cases would be remote from the situs of the property and from the residence of the persons interested in the estate; so wide, inded, that the Consul General would frequently be outside the territorial jurisdiction of the Court in which the administration would be pending.

In the *Fattosini case,* 33 Misc. Rep. 18, 67 N. Y. Supp. 1119, cited by counsel for the Consul General, this important question of interpretation was not considered, and in the *Wyman case,* 191 Mass. 276, 77 N. E. 379, 114 Am. St. Reps. 601, it was dismissed with a few words which indicate that it had not been duly impressed on the Court's mind. In the *Lobrasciano case,* 38 Misc. Rep. 415, 77 N. Y. Supp. 1040, the question was discussed by the Court but the Court in that case erroneously assumed that the universally accepted definition of "intervene" given in the dictionaries quoted above was a narrow technical meaning peculiar to New York law. When compared with the lucid and satisfactory reasoning of the Court in the *Logiorato case,* 69 N. Y. Supp. 507, 34 Misc. 31, the reasoning of the opinion in the *Lobrasciano case,*

quoted in appellant's brief, appears artificial and shallow.

In *Logiorato's Estate*, 69 N. Y. Supp. 509, the Court said:

> "It will be observed that the right assured to the Consul General is to 'intervene', and that this intervention is to be 'conformably with the laws of the country'. To intervene is to 'come between' (Webst. Dict.) and the right to intervene in a judicial proceeding is a right to be heard with others who may assert demands or defenses. It is not a right to take possession of the entire corpus of a fund which is the subject of the proceeding. A right to intervene 'conformably with the laws' of the State of New York is something different from a right to set aside the laws of the State, and take from a person who, by those laws, is the officer intrusted with the administration of the estates of persons domiciled here, and who leave no next of kin within the jurisdiction, the right and duty of administering their assets. . . . The eminent text writers cited in the opinion of the learned surrogate (in the Fattosini case), do not intimate that the courts of civilized states, acting under general laws framed for the protection of foreigners equally with their own citizens must grant administration, contrary to the terms of those laws, to consuls, under any circumstances, whatever. Thus in Wools. Int. Law, p. 154, the learned writer, in enumerating the duties of consuls, includes the power 'of administering on the personal property left within their consular districts by deceased persons, when no legal representative is at hand, and when law or treaty per-

> mits, and thus of representing them, it may be, before the courts of the district'. Consuls may accept administration, but no right to override the local law is suggested. See also, Wheat. Int. Law (3rd ed.) 167, 168".

The Fattosini and Lobrasciano decisions were by the surrogates of Westchester county. The Logiorato decision was by the surrogate of New York county. All three were by judges of equal jurisdiction.

In *Lanfear* vs. *Ritchie*, 9 La. Ann. 96, the Vice Consul of Norway and Sweden asserted a right to administer upon the estate of a deceased national under the laws of nations, the laws of the United States, and by virtue of treaties entered into between the United States and Sweden and Norway. The Supreme Court of Louisiana said:

> "The right claimed is incompatible with the sovereignty of the State whose jurisdiction extends over the property of foreigners as well as of citizens found within its limits. The disposition of the estates of foreigners has been made the subject of special legislation and no treaty or law of the United States exists which as the paramount law confers any such right as is claimed by the petitioner, nor are we aware of any principle of the laws of nations which would entitle the petitioner to call in question the authority of our laws on that subject".

The representatives of the United States in the conclusion of the treaty with the Argentine Republic, being acquainted with our system of the administration

of estates of persons dying intestate, could not possibly have meant or intended that the resident heirs and creditors of a citizen of the Argentine Republic dying in the United States should look for the protection of their rights in the matter of the administration of the estate to the consul of a foreign nation, unfamiliar and possibly unsympathetic with the laws and customs of the United States relating to the administration of estates; a consul who would be in all cases an alien and in some cases probably unacquainted with the English language.

There can be no doubt, therefore, that the "creditors and legal heirs" referred to in the treaty with the Argentine Republic are the creditors and legal heirs of the deceased residing in the country represented by the consul. The consul of a nation is an official charged with the duty, of protecting the interests of his fellow countrymen. The interests of heirs and creditors resident in the country whose courts have jurisdiction of the estate are always, in civilized lands, protected not by foreign consuls but by the duly authorized and elected local official whose office it is to administer. The language in the treaty, relied on by the Consul General, undoubtedly means that the consul, ex officio, shall have the right to "intervene" in the administration of the estate of a citizen of his nation dying intestate in the United States to the end that the rights of the foreign heirs and creditors of the deceased may be protected. Further than this, the intervention of the consul would be unnecessary, futile, and entirely out of conformity "with the laws of the country". The ob-

ject of the treaty is secured if the consular officer "intervenes" in the administration of the estate by entering an appearance on behalf of the foreign heirs and creditors and thus acquires the right to watch the administration and represent them in all particulars. If it had been intended that the consul should be given, under the treaty, the right to administer on estates it would have been expressly so stated in the treaty.

Such being the case, the rule of construction laid down by Vattel, in Book II, Ch. 17, Sec. 287, is directly applicable.

> "The reason of the law or of the treaty, that is to say, the motive which led to the making of it, and the object in contemplation at the time, is the most certain clue to lead us to the discovery of its true meaning; and great attention should be paid to this circumstance, whenever there is question either of explaining an obscure, ambiguous, indeterminate passage in law or treaty or of applying it to a particular case. *When once we certainly know the reason which alone has determined the will of the person speaking, we ought to interpret and apply his words in a manner suitable to that reason alone,* otherwise he will be made to speak and act contrary to his intention, and in opposition to his own views".

The reason of the Argentine treaty was the protection of foreign heirs and creditors, and this can be accomplished by the mere intervention of the consul.

Not only, however, does the Argentine treaty restrict the consul expressly to the right of intervention, but it provides that the intervention must be "conformably

with the laws of the country"; a most significant limitation.

This limitation was inserted in the treaty to avoid the vexed question of the right of the treaty-making power to trespass on the reserved authority of the States of the Union. Jurisdiction over the administration of the estates of deceased persons is part of that reserved authority. "Conformably with the laws of the country", therefore, means in this country conformably with the laws of the several States, for there is no federal law of administrations.

But in what sense can a consul demand letters of administration on the estate of Ghio conformably with the laws of California when the laws of California give to certain of the heirs and, failing resident heirs, to the public administrator a prior right to letters and when the laws of California require an administrator to take an oath of allegiance which an alien cannot in conscience take? The formula of the oath which an administrator takes was held in *Cohen* vs. *Wright*, 22 Cal. 309, to constitute an oath of allegiance.

It is not answering this argument to say that the phrase "conformably with the laws of the country" refers only to procedure subsequent to the appointment of the consul to the administratorship, for the treaty makes no such distinction. By the terms of the treaty the consul may "intervene" only in conformity with the laws of the country. If "intervene" means that he may be appointed administrator, the limitation remains the same. He may be appointed administrator only when the laws of the country permit; and in California

the laws of the country do not permit a foreign consul to be appointed administrator ahead of the heirs, creditors or public administrator. The statute of California prescribes the order in which persons shall have the right to be appointed administrator. If the appointment of a consul in a particular case would alter this order in what sense would it be "conformably with the laws of the country"? Surely an appointment which overrides the laws does not conform with the laws.

That this view of such limiting phrases in treaties is the view taken by the State Department of the United States we learn from an official letter of James G. Blaine, former Secretary of State, which has been published in the Foreign Relations of 1890. It appears from that record that the 10th paragraph of the 3rd Article of the consular convention of 1850 between the United States and New Granada (now U. S. of Columbia) provides that the consuls of the contracting parties

> "may take possession, make inventories, appoint appraisers to estimate the value of articles, and proceed to the sale of the movable property of individuals of their nation who may die in the country where the consuls reside without leaving executors appointed by their wills or heirs at law".

Mr. James G. Blaine in a letter, dated May 29th, 1890, to Mr. Abbott (For. Rel. of the U. S. 1890, p. 255) said, in part, of this provision of the treaty:

> "The only exception to the exercise of this power is found in the provision that 'consuls shall not discharge this function in those states whose

peculiar legislation may not allow it'. The reason and effect of these provisions are clear. In the United States, just as was formerly the case in Colombia, legislative power in respect to the settlement of estates is vested in the several states. It has always been controverted whether the exercise of this power could constitutionally be controlled by the government of the United States, either by law or treaty. In order to meet this difficulty it was provided by the present treaty that consuls should not exercise the function of settling estates in states where 'peculiar legislation' might not allow it. The term 'peculiar legislation' means simply legislation of particular political divisions of the country possessing legislative power with respect to the subject matter. The term 'those states' was also obviously employed in reference to the same political divisions, and could not have been used in reference to the contracting governments. So far as those governments were concerned, they bound themselves, in all places where they possessed the necessary jurisdiction, to permit consuls to exercise the function in question. So clear does this appear to be that the department does not perceive how any other construction may be placed upon the treaty".

There is no substantial difference in meaning between the phrase "consuls shall not discharge these functions in those States whose peculiar legislation does not allow it" in the treaty with Colombia, and the phrase "conformably with the laws of the country" in the treaty with the Argentine Republic. It is noteworthy, also, that the Colombian treaty was made only three years earlier than the Argentine treaty.

On the well-settled point that the opinions of the political department are weighty authorities on the interpretation of treaties the Court is referred to Moore's Digest of Int. Law, Vol. 5, p. 241, Sec. 761, and the cases there cited

In

Castro vs. *de Uriarte*, 16 Fed. 98,

the Court, discussing a treaty, quotes an official letter of Mr. Freylinghusen, Secretary of State, to the Spanish Minister, and then remarks:

> "While the construction which may be placed by the executive department upon laws and treaties is not necessarily binding upon the judiciary, yet where its construction is not repugnant either to their letter or obvious intent, and, as in this case, is sustained by such manifest considerations of convenience and expediency, it should be adopted without hesitation".

That the Italian government has acquiesced in the interpretation of the Argentine treaty suggested by us in this case appears from an interesting correspondence which may be found in the published Foreign Relations of the United States, 1894, at p. 366. Edwin F. Uhl, Acting Secretary of State, writing to Baron Fava, the Italian Ambassador, as follows, under date of 24 May, 1894, in response to a note from Baron Fava proposing that the consuls of Italy in the United States be authorized to settle the estates of their deceased fellow countrymen after being notified of their demise by the local authorities, said:

"In reply I beg to say that the United States *has never entered into any treaty granting to the consuls of foreign countries in this country such authority as that you suggest should be given to the consuls of Italy*. The entire question of the administration, settlement and distribution of decedents' estates in this country is under the control of the respective States. . . . These considerations compel me, though with much regret, to dissent from the opinion entertained by you that the Italian consuls should by international agreement be given the authority you demand for them".

It will be observed that the Argentine treaty was made in 1853 and the treaty with Italy on which the Consul General relies in 1878. These negotiations between the Italian minister and the Secretary of State occurred in 1894 and both parties, therefore, are presumed to have had the two treaties in mind. Yet the Italian minister did not claim any right for Italian consuls to administer under the Argentine treaty as appears from his proposal of a new treaty to give them that right. This construction, placed upon the Argentine treaty and the Italian treaty by the Italian government, as represented by its minister at Washington, appears to us to be conclusive on the Italian Consul General in this case.

It is a notable fact, to be given great weight in the construction of the Argentine treaty, that neither the United States, as appears from Mr. Uhl's remarks, nor the Argentine Republic, the two parties to the treaty, nor any one of the numerous powers whose treaties with the United States contain the "most favored

nation" clause has ever claimed the rights under the treaty which the Italian Consul General claims, or has ever insisted on the construction for which the Italian Consul General contends. The Argentine treaty was in existence fifty years before any such interpretation of the treaty was asserted and it has never been asserted by either party to the treaty.

Long practical construction of a statute (and in its aspect as the supreme law of the land as distinct from an international contract a treaty is a statute) will be accepted by the Courts.

United States vs. *Hill*, 120 U. S. 169;
State vs. *Davis*, 60 S. E. 588;
State vs. *Harden*, 58 S. E. 715;
Fullington vs. *Williams* (Ga.), 27 S. E. 184;
Holmes vs. *Hunt* (Mass.), 23 Am. Rep. 385;
State vs. *Holcomb* (Neb.), 64 N. W. 437;
Atwell's Estate (Minn.), 101 N. W. 946;
Continental Imp. Co. vs. *Phelps*, 11 N. W. 167; 47 Mich. 299;
Detroit City Ry. vs. *Mills*, 48 N. W. 1007 (88 Mich. 634).

Will the Court, then, in this case reject the construction which both parties to the Argentine treaty have placed upon it for more than fifty years; a construction in which, as we have shown, the Italian government, by its minister, acquiesced in 1894? Will the Court, on the prayer of an outsider, read into a treaty or into any compact a meaning not intended or adopted by the parties to it?

The treaty with Italy entitles the Italian Consul General to such rights as may be "granted" to the

officers of the same grade of the most favored nation; but in what sense can it be said that the right to administer on estates has been "granted" to Argentine consuls when no Argentine consul, since the treaty was made, has ever demanded or received letters of administration by virtue of the treaty? Should the Italian Consul General receive letters in this case on the estate of Ghio he would be receiving more, under the Argentine treaty, than any Argentine consul ever received; he would obtain rights and privileges not only equal but superior to those of the Argentine consul under the treaty. Will the Court hearken to his demand, at this late day, for a construction of the Argentine treaty so novel, and so different from that in which all the parties interested have acquiesced for half a century? And, should the Court deny his petition, in what respect will the Italian Consul General be less favored than the Argentine consuls in the United States?

The "most favored nation" clause which appears in our treaty with Italy appears also in our treaties with Belgium, Germany, Great Britain, Greece, Guatemala, Netherlands, Roumania, Servia and Spain.

If the construction which the Italian Consul General would place upon the treaty with the Argentine Republic is correct, then consuls of the Argentine Republic since 1853 and consuls of the several other nations above-named since their treaties with United States were concluded, have had the right to administer upon estates of citizens of their respective nations dying intestate in any state of the Union; and consuls of the United States have had similar rights with regard

to the estates of citizens of the United States dying intestate in Belgium, Germany, Great Britain, Greece, Guatemala, Italy, Netherlands, Roumania, Servia and Spain. That our consuls and the consuls of those other nations do not possess this right is proved by the official letter of Mr. John Hay, then Secretary of State, dated February 3rd, 1900 (242 MS. Dom. Let. 522, archives of the State Department), addressed to Senator E. O. Wolcott. In this letter Secretary Hay says:

> "With regard to the second inquiry, pertaining to the last clause of Article III, it may be said that the right of a consular officer to appear personally in behalf of the absent heirs or creditors until they are otherwise represented, does not imply that consular officers have the status of attorneys or are to perform the duties of a public administrator. By the law of nations a consular officer is the provisional conservator of the property within his consular district belonging to his countrymen deceased therein. The United States Consular Regulations direct our consular officers, when the foreign local authorities institute proceedings in relation to the property of deceased Americans who leave no representatives in the foreign country, to intervene by way of observing the proceedings, but it is not understood that this involves any interference with the functions of a public administrator."

If consuls of the United States had the right to administer upon the estates of citizens of the United States dying intestate in any of the nations above mentioned, why should the United States Consular Regulations, as stated by Mr. Hay, direct "our consuls to intervene by

way of observing the proceedings"? and why should Mr. Hay add: "It is not understood that this involves any interference with the functions of a public administrator"?

The Court's attention is invited to Mr. Hay's definition of the word "intervene" as used with reference to the appearance of consuls in the administration of estates.

If the Italian Consul General's interpretation of the Argentine treaty of 1853 is sound why did Italy and the United States, in the treaty of 1878, provide explicitly, as they did, that the consuls of the two nations should have rights more restricted than those which, according to the Italian Consul General, they received through the "most favored nation" clause?

In the Consular Convention of 1878, between Italy and the United States, relied on by the Consul General in the case at bar, Article XVI ("Treaties in Force 1904", page 461), is as follows:

> "In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the consuls or consular agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested."

A similar provision is to be found in the conventions of the United States with Belgium, 1880, Article XV; Germany, 1871, Article X; Great Britain, 1899, Arti-

cle III; Greece, 1902, Article II; Guatemala, 1901, Article III; Netherlands, 1878, Article XV; Roumania, 1881, Article XV; Servia, 1881, Article II, and Spain, 1902, Article III.

Each of the conventions of the above-named countries with the United States contains also a provision giving to consuls of the respective nations the rights, privileges and immunities granted to consuls of the "most favored nation". In other words, each of the countries above named has in its treaty with the United States exactly the same provisions as appear in the treaty between Italy and the United States. Each of these treaties has been concluded since the Argentine treaty was concluded. Yet neither the United States nor any of these countries has ever deemed or contended that under the said provisions in their respective treaties the consuls of the contracting parties had the right to administer on the estates of citizens of their nation dying intestate in the territory of the other. Each of these nations has taken the view that the right of the consuls under such provisions is only the right to be notified by the local authority of the death of a citizen of the nation represented by the consul, so that the consul might forward information to persons resident in his nation who are concerned.

If any of the above-named powers—including Italy, —with whom treaties have been made by the United States since 1853, when the Argentine treaty was concluded, had contemplated or understood that the "most favored nation" clause in their respective treaties conferred upon their consular officers the extraordinary

rights demanded by the Italian Consul General in this case, under his interpretation of the Argentine treaty, it would have been not only futile but contradictory for them to have provided specifically, as was done in Article XVI of the treaty with Italy and in similar stipulations in the other treaties, for rights and privileges of less extent than those automatically devolving on them through the "most favored nation" clause by virtue of the terms of the Argentine treaty.

It must be borne in mind that the Civil Law is the basis of jurisprudence in the Argentine Republic. In the Argentine Republic the administration of estates is carried on in a manner entirely different from our own system. Letters of administration and supervision over administration are unknown in civil law countries. But since the grant of powers to consular officers in the treaty is nothing if not reciprocal, with what force can it be argued that the treaty confers on the Argentine consuls in the United States a privilege not conferred on United States consuls in the Argentine Republic where, it appears, the law knows no such functionary as an administrator?

With all these considerations in mind, is it not reasonable to suppose that if the parties to the Argentine treaty had intended to concede to consuls a right so extraordinary, so subversive of the ordinary routine of the settlement of estates, so directly at variance with usage in countries not barbarian or semi-barbarian, so offensive to the usual notions of the due rights of kindred, as the right to letters of administration in precedence of the resident heirs, they would have made the

intention plain? And if the language of the treaty does not definitely and manifestly express such an intention should not courts give the treaty a construction more in conformity with the customs, and more consistent with the notions of national dignity, prevalent in civilized states?

II.

The "Most Favored Nation" Clause in the Treaty With Italy Does Not Entitle the Italian Consular Officers to Demand Whatever Privileges May be Accorded to Argentine Consular Officers Under the Treaty With the Argentine Republic.

In none of the few cases in which the right of administration demanded by Italian consuls under the Argentine treaty has been involved does it appear that either counsel or the Court considered the very interesting question of the meaning and effect of the "most favored nation" provision in treaties. It seems to have been assumed, without inquiry, in those cases that the "most favored nation" clause in the treaty with Italy invested Italian consuls with all the rights and privileges conferred on consuls of the Argentine Republic by the treaty with that country. The only issues discussed in any of the cases cited were the meaning of the Argentine treaty and the extent of the treaty-making power in the United States.

The authorities hold, however, emphatically and unanimously, that the "most favored nation" clause

has no such meaning or application as that claimed for it in this case by the Italian Consul General.

The "most favored nation" clause in a treaty goes no further than to secure to the nation for whose benefit it is written the advantages or privileges which may be granted *freely and without consideration* by its ally to other nations. But the "most favored nation" clause does not automatically convey to a treaty-party benefits which may be conceded to a third power in another treaty as the *price* of benefits obtained in exchange from that third power. In other words, the most *favored* nation is not the nation which has purchased by concessions the most liberal advantages, for such advantages are not *favors* but *rights* bought for a valuable consideration; and the nation claiming such advantages under a "most favored nation" clause may not have paid or be in a position to pay the consideration for which those advantages were granted.

By way of example applying this doctrine to the case at bar, if the United States as an act of bounty and as conferring a favor had granted to Argentine consuls the right to administer on estates in certain cases, the Italian consuls under the "most favored nation" clause would be entitled to administer on estates in similar cases, for the Argentine Republic otherwise would be a more favored nation than the Kingdom of Italy.

But since each part of a treaty (as of an ordinary contract), is in consideration of all the other parts of the treaty, whatever privileges the United States may have conceded by the treaty in question here to the consuls of the Argentine Republic were conveyed as

the consideration of a bargain and in return for the concessions which the Argentine Republic in the same treaty has made to the United States. Italy cannot demand those privileges for Italian consuls since Italy has not paid the price which the Argentine Republic has paid for them.

Nor would it be paying the same or an equal price for Italy to offer to the United States concessions similar to those yielded by the Argentine Republic in the treaty; for a concession which, coming from the Argentine Republic, might be extremely valuable to the United States, might very well be, owing to different conditions, of no value when coming from Italy to this country.

For instance, the Argentine treaty provides, among other things, for reciprocal freedom of commerce and reciprocal freedom from discriminating duties between the United States and the Argentine Republic. Circumstances might make this reciprocity with the Argentine Republic an advantage so precious to the United States that it would gladly grant in return extraordinary privileges to Argentine consuls in this country; privileges that it might not be willing to grant to the consuls of any other nation. Such commercial and tariff reciprocity with the Argentine Republic might secure, in certain circumstances, a virtual monopoly of the rich Argentine market for divers products of the United States; while similar reciprocity with Italy might, for one reason or another, be worthless to this country. The wines of California, entered duty free or as preferred imports in the Argentine Republic,

might find an enormous sale; but in the Italian market they might not be able to compete with the famous yield of Tuscan vineyards. Or, to invent another illustration, the United States in 1853, when the treaty was made might have had a particular desire to secure to American consuls in Argentina the right to administer, for society in the Argentine Republic was not then well organized and there may have been an especial need for peculiar protection to the estates of Americans dying in that country; but in Italy and other countries, where government was stable and order secure, no such need existed and the United States would have given no concession for such a reciprocal privilege.

In fine, the "most favored nation" clause is a provision against arbitrary discrimination, not a blind and unrequited gift of special advantages. If a father gives a farm gratis to one son and not to his other sons that is discrimination and the others may justly complain. But if the father, needing money for a purpose, sells the farm to one son for a fair price there is no discrimination: the others are not wronged and have no right to insist that similar farms be given to them for nothing or even for the price which the first son paid, since the father may not need the additional money and may prefer to keep the other farms.

Were not this the true interpretation of the "most favored nation" clause, were the clause held to mean what the Italian Consul General in this case contends that it does mean, it would lead to the most absurd situations in the dealings of nations with one another. It would deprive most of the civilized nations of the

power to give effect to reciprocity contracts or to make international bargains without admitting the rest of the world to the benefits.

The meaning of the "most favored nation clause" was learnedly considered by the distinguished lawyer, Caleb Cushing, in 1853, in an opinion rendered by him as Attorney General of the United States to the Secretary of State, Mr. William L. Marcy. Mr. Cushing's opinion is to be found in Vol. 6, Opinions of Attorneys General, page 148.

The question presented in that matter to the Attorney General arose on the following state of facts:

In the treaty of 26 April, 1826, between the United States and Denmark, it was provided that the two nations

> "engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession were freely made, or on allowing the same compensation, if the concession were conditional".

It was provided, further, that the two nations

> "agree mutually to receive and admit consuls and vice-consuls in all the ports open to foreign commerce, who shall enjoy in them all the rights, privileges and immunities, of the most favored nation".

By the treaty of 4 July, 1827, between the United States and Sweden and Norway, it was provided that the local authorities of each of the contracting powers should surrender deserting seamen from the ships of

war and merchant vessels of the other to the consuls, vice consuls or commercial agents of that country.

Denmark demanded of the United States the surrender to her consuls of deserters from Danish ships, and the question was whether the "most favored nation" clause in the treaty with Denmark drew after it the right to the privilege regarding deserting seamen granted to Sweden and Norway in the treaty with that kingdom.

The Attorney General advised the Secretary of State that Denmark's claim was not valid. In stating his reasons for this opinion he said:

> "If the United States should, by their own law, and of their own mere will and concession, enact any benefit of commerce or navigation in favor of a particular nation, it is conceded that the terms of the treaty with Denmark would entitle her to enjoy the same benefit, freely, if such concession were freely made, or on allowing the same compensation, if the concession were conditional, the same in every case so long as the particular law should remain in force and unrepealed: for any such law, being enacted by the sole will and power of Congress, might be for a certain or indefinite time, and could be repealed at the pleasure of the United States.
>
> "But the stipulations before cited, between the United States and other powers, are not favors in respect of commerce and navigation, but contracts, solemn compacts, obliging the honor and good faith of both contracting parties. . . .
>
> "Now, in the treaties and conventions between nations, the general doctrine is that any special

advantage conceded by a party under any one article of the compact is in consideration of all the advantages enjoyed by the same party under that and all other articles of the treaty. Each particular article is consented to by each party in consideration of all the other articles, and all the articles united form the consideration of each particular article.

"Vattel lays down the rule as follows: 'We cannot consider the several articles of the treaty as so many distinct and independent treaties; for, though we do not see any immediate connection between some of those articles, they are all connected by this common relation, viz., that the contracting powers have agreed to some of them in consideration of the others and by way of compensation. I would, perhaps, never have consented to this article, if my ally had not granted me another, which, in its own nature, had no relation to it. Everything, therefore, which is comprehended in the same treaty, is of the same force and nature as a reciprocal promise, unless where a former exception is made to the contrary'. (Vattel, book II, Chap. XIII, pp. 214, 215. See also Grotius de Jure Belli et Pacis, book I, II, cap. 15, 515; Wildman's Institutes, vol. I, p. 174.)

"It is obvious, therefore, that as a treaty is one pact, to be observed and fulfilled in all its conditions, whether of advantage or disadvantage, neither of the contracting parties can rightfully select one of the articles by reason of the benefits flowing therefrom, and reject other articles because of the inconvenience involved in their execution. *And, by still stronger reason, another power, not a party to the given treaty, can have no*

right, under claim of a 'favored Nation' clause in its treaty, to make selection of one particular article of the former treaty, and insist on the enjoyment of the advantages to result from the performance of the selected article. (Italics ours.)

"Hence, the expressions in the first and eighth article of the treaty with Denmark, and similar expressions in other treaties, as 'favor', or 'freely if the concessions are freely made', or 'if the concessions were conditional on allowing the same compensation' are not applicable to advantages growing out of treaties containing various articles of reciprocal pact and stipulation; for such advantages are purchased upon consideration, upon mutual and correlative engagements, positively binding the good faith of the contracting parties, with perfect reciprocal obligation in terms and manner as to the things to be done or suffered. Such treaty benefits are not favors, boons, or concessions. These expressions apply only to things proceeding from the mere will and pleasure of the state granting them, in matters within its sole jurisdiction, and which the other party, to whom they are profferred, may or may not, in his own good pleasure, accept."

Mr. Cushing then expatiates his argument by supposing that the United States should, *by its own law*, admit Swedish iron manufactures to the United States on payment of a certain specially low duty. In that case, he says, Denmark might rightfully claim under its treaty the same privilege for Danish iron manufactures. But if the United States *by treaty* should grant a tariff advantage to Swedish iron products *in consider-*

ation that cotton and tobacco products of the United States should obtain similarly a special tariff advantage at Swedish ports, in such case Denmark could not claim the advantages granted to Sweden for the reason that "there would not be favors conceded by the United States to Sweden, but advantages purchased by Sweden of the United States".

Nor, Mr. Cushing argues, could the advantages of the United States arising from the agreement with Sweden be affirmed to be equally compensated by the like terms offered by Denmark to the United States.

In other words, the Danish market, by reason of sparse population or domestic competition, might not be so desirable a field for the cotton and tobacco of the United States as the Swedish market and it is not presumed that the United States would make as great a concession to gain the Danish as to gain the Swedish market.

In *Whitney* vs. *Robertson*, 124 U. S. 190, this interpretation of the "most favored nation clause" was recognized by the Supreme Court of the United States. The United States by a reciprocity treaty with the King of the Hawaiian Islands had provided that Hawaiian sugar might enter the United States free of duty. The pre-existing treaty between the United States and the Dominican Republic provided that "no higher or other duties shall be imposed on the importation into the United States of any article, the growth, produce or manufacture of the Dominican Republic or of her fisheries, than are or shall be payable on the like articles, the growth, produce or manufacture of

any foreign country or of its fisheries". This is one of the three or four common forms of the "most favored nation" clause. The plaintiffs, certain importers, claimed the right of free entry for sugar produced in San Domingo but the Court rejected the claim. The Court held that the article of the treaty with the Dominican Republic was merely

> "a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce or manufacture of their respective countries, in favor of articles of like character imported from any other country. It has no greater extent. It was never designed to prevent special concessions upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our government intended to preclude itself from such engagement with other countries which might in the future be of the highest importance to its interests."

And in *Bartram* vs. *Robertson*, 122 U. S. 116, which is the leading case on the subject, the same question was decided in the same way. In that case the plaintiffs claimed free entry for sugar from the Island of St. Croix, which was a part of the dominions of the King of Denmark, under the terms of the treaty between the United States and the Hawaiian Islands. They relied on a provision in the treaty between the United States and Denmark in which the contracting parties engaged mutually

"not to grant any particular favor in respect of commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession were freely made, or on allowing the same compensation, if the concession were conditional".

This is another common form of the "most favored nation" clause.

Justice Field in his opinion said:

"Those stipulations, even if conceded to be self-executing, by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the Kingdom of Denmark, to each other, that, in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges. The stipulations were mutual for reciprocal advantages."

Justice Field further said:

"There is in such exemption (of Hawaiian sugar) no violation of the stipulations in the treaty with Denmark, and if the exemption is deemed a 'particular favor', in respect of commerce and navigation, within the first article of that treaty, it can

only be claimed by Denmark upon like compensation to the United States. It does not appear that Denmark has ever objected to the imposition of duties upon goods from her dominions imported into the United States, because of the exemption from duty of similar goods imported from the Hawaiian Islands, such exemption being in consideration of reciprocal concessions which she has never proposed to make. Our conclusion is, that the treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions. On the contrary, the treaty provides that like compensation shall be given for such special favors. When such compensation is made it will be time to consider whether sugar from her dominions shall be admitted free from duty."

In the case of *Whitney* vs. *Robertson,* quoted above, which came before the Court in the year following the decision in *Bartram* vs. *Robertson,* Justice Field decided that it made no difference whether "the most favored nation clause" contained a provision for reciprocal concessions as in the Danish treaty, or was an unconditional stipulation for the concessions made to the "most favored nation", as in the Dominican treaty. In either case the "most favored nation clause" did not carry with it the right to privileges purchased from the third power in return for valuable concessions.

This doctrine was applied directly to a privilege claimed by a consul in a letter of Mr. Buchanan, Sec-

retary of State, to the Chevalier Hulsemann, May 18, 1846 (Moore, Vol. 5, p. 26).

The Austrian Charge d'Affaires having claimed, under the "most favored nation" clause, the benefit of the stipulation in the treaties of the United States with Russia and certain other countries, conferring upon consuls jurisdiction of disputes between the masters and crews of vessels, the Department of State replied:

> "Seeing that the right now under consideration, where it can be claimed under a treaty wherein it is expressly conferred is, in every instance, given in exchange for the very same right conferred in terms equally express upon the consuls of the United States, it can not be expected that it will be considered as established by the operation of a general provision which, if it were allowed so to operate, would destroy all reciprocity in this regard, leaving the United States without that equivalent in favor of their consuls, which is the consideration received by them for the grant of this right wherever expressly granted."

For a compendious discussion of the "most favored nation" clause, in which all the instances are collated and the authorities discussed, see *Moore's Digest of International Law,* Vol. 5, pp. 257 to 319.

Our argument on this point cannot be more aptly or strikingly concluded than by quoting from an official letter which the Secretary of State, Mr. Bayard, wrote to Mr. Jacob F. Miller of New York, June 15th, 1886, and a copy of which is in the archives of the State Department (160 MS. Dom. Let. 481). *In this*

letter Mr. Bayard construed and applied the identical "most favored nation" clause in the treaty with Italy of February 26, 1871. Mr. Bayard said:

> "I have to acknowledge your letter of the 10th instant relative to the rights of Italians to hold real estate in this country under the 'most favored nation' clause of our treaty with Italy. * * *
>
> "Is, however, a foreign government having with us no treaty containing a provision of this kind but having a treaty engagement with us giving it the privileges of the 'most favored nation' entitled to avail itself of the privileges in this respect granted by us in other treaties. The answer depends on the meaning to be assigned to the words 'most favored nation' in this relation. This meaning I hold to be definitely settled. A covenant to give privileges granted to the 'most favored nation' it was held by two of the most distinguished of my predecessors, Mr. Clay and Mr. Edward Livingston, only refers to 'gratuitous privileges' and does not cover privileges granted 'on the condition of a reciprocal advantage.' This distinction has since then been repeatedly affirmed and is accepted by foreign publicists with great unanimity. This quality of reciprocity which takes a case out of the category of gratuitousness belongs I apprehend to all our concessions to foreign states giving their citizens right to hold real estate in the United States. Such concessions are based on reciprocity. We give the right to them because they give the right to us. Hence such privileges cannot be claimed under 'the most favored nation' clause, by foreign governments to which they are not specifically conceded."

In brief, the argument on this point, is that if the United States has conceded to Argentine consuls the right to administer, the right was granted in return for a like right, and other rights, granted to the United States and its consuls. Italy cannot obtain gratis under the "most favored nation clause" a right for which the Argentine Republic has paid a price.

But the Italian Consul General may reply that at least he is entitled to the benefits of the Argentine treaty if Italy pays the same price for them that the Argentine Republic paid; that is, especially, if Italy grants to American consuls in Italy the right here demanded for Italian consuls in the United States.

In the first place, the authorities quoted by us prove that Italy has no right to the benefits of the Argentine treaty on offering to make the same concessions to the United States that the Argentine Republic made, for those concessions from Italy might not be worth as much to the United States as the similar concessions from the Argentine Republic.

In the second place, there is nothing in the record of this case to show that the Italian government has granted or offered to grant to the United States and its consuls the rights, privileges and immunities including the right to intervene in the administration of estates which the Argentine Republic by the treaty has granted. In particular, there is nothing in the record to show that American consuls in Italy enjoy the privilege which the Italian Consul General in this case demands for himself.

Not only has the Italian Consul General failed to

prove that the Italian government concedes to American consuls in Italy the right to administer on the estates of intestate American citizens dying there, but, under the law, there is no way in which that fact can be proved in an American Court except by a legislative act of the United States, declaring the fact to exist and commanding American Courts to recognize a like right in Italian consuls.

In

Foster vs. *Neilson,* 27 U. S. (2 Pet.), p. 314, the Supreme Court of the United States by Chief Justice Marshall said:

> "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provisions. But when the terms of the stipulation import a contract—*when either of the parties engages to perform a particular act,*—the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."

On this point *Foster* vs. *Neilson* has been approved a number of times. See Rose's Notes on *U. S. Reps.,* Vol. 2, pp. 837-841. The doctrine was expressly applied to a reciprocity treaty in *Taylor* vs. *Morton,* 2 Curt. 463, Fed. cases 13,799.

In other words, according to the doctrine of *Foster* vs. *Neilson,* not only must the Italian government have performed its part but the legislative department of

our government must have affirmed that fact, by a legislative act, before the judicial department, that is, the Courts, State or Federal, in the United States, can take cognizance of the fact and enforce the claim of the Italian Consul General to the benefits of the Argentine treaty on the strength of the "most favored nation" clause in the Italian treaty. Whether or not the Italian government has accepted the benefits of the Argentine treaty and tendered to American consuls in Italy the privileges which the Italian Consul General at San Francisco in this case demands is a *political fact* to be determined and certified first by the political department of the United States government before American Courts can take notice of it. The Courts could no more take notice of such a fact before it had been established and proclaimed by the political department of our government than they could take notice of the establishment of a new de facto government in a foreign State or whether a state of war existed or whether the boundaries of a foreign State had changed. The reason of the rule is obvious. Whether or not Italy's concessions to American consuls—if Italy had attempted to make any such concessions—were sufficient to entitle that nation's consuls, stationed in the United States, to the benefits of the Argentine treaty is a matter which must be determined to the satisfaction not of the first Court, here or there, before which the question arises, but to the satisfaction of the political department of the United States government; the department which makes and imposes laws, not the department which construes and applies them; for the

determination of the fact is essentially a legislative act. Whether that political fact should be established by a proclamation of the President and Senate (the treaty-making power) or by Act of Congress is not in this case a material speculation. It suffices that the determination of the fact is outside the judicial province.

Indeed, however, this exposition of the interesting doctrine of *Foster* vs. *Neilson*, and this distinction between the functions of the political and the judicial departments of our government are material to the case at bar only in so far as they illustrate the dilemma confronting the Italian Consul General. For, as our argument demonstrates, the question whether or not Italy permits American consuls to administer on the property of American intestates who die in that country, has no bearing on the case in view of the fact that the Argentine treaty is a reciprocal bargain and that whatever privileges were granted by that treaty to Argentine consuls were yielded not as bounties, not as favors, but as part of the price paid for benefits secured to this country.

III.

Should the treaty-making authority in the United States provide by treaty that Argentine consuls shall have the right, in preference to the local heirs, creditors, or public administrator, to administer on the estates of citizens of the Argentine Republic dying intestate in the United States the treaty in that respect would be void

as being in excess of the constitutional powers of the treaty-making authority and a violation of the rights reserved to the States.

We do not deem it likely, in view of the foregoing considerations, that the Court will be obliged, in the case at bar, to determine the great question of the limits of the treaty-making power in the United States; and for that reason we have not undertaken an exhaustive argument on this point.

Inquiry into the limits of the treaty-making power leads into a practically unexplored region of constitutional law. For, while the authorities agree that the treaty-making power is not without bounds, and while a number of the authorities have stated in vague terms some of the limitations on this power in the government of the United States, no Court has attempted to define precisely the extent of that authority.

In considering the range of the treaty-making power, which is not limited expressly by the constitution, it is necessary, of course, to keep in mind these elementary principles of our government; that the Constitution of the United States is a grant of power to the federal government; that the branches of the federal government, including the President and the Senate in their joint treaty-making capacity possess only those powers granted to them expressly in the Constitution and the powers necessarily implied therein as incident thereto; that prior to the adoption of the Constitution each of the States possessed all the sovereign powers of an inde-

pendent government; that all the powers of sovereignty not granted expressly or by necessary implication to the federal government in the Constitution remain in the States; and that it is beyond the authority of any branch of the federal government to encroach on the powers reserved to the States.

A treaty, like an Act of Congress, is the supreme law of the land only when it deals with matters within the jurisdiction of the federal authority by which it is enacted; and a treaty, like an Act of Congress, which trespasses on the reserved rights of the States is, to the extent of the trespass, void.

In this connection it is important to bear in mind the two aspects of a treaty in the United States. According to international law, a treaty is nothing more than a contract between two sovereign powers. Each of the treaty-powers must find the means of carrying out the stipulations and each is responsible politically to the other for a breach of the contract. Neither, however, is concerned about the methods by which the other fulfills its treaty obligations.

But in the United States a treaty is not only an international contract. The Constitution declares it to be "the supreme law of the land". The political department of the government views a treaty as an international contract but the Courts view it solely as the supreme law of the land and will enforce it, as they will enforce an act of Congress, only when it is not repugnant to the Constitution of the United States. While internationally binding as a contract, a treaty may be municipally inoperative as a statute.

In re Ah Lung, 18 Fed. 28;
See note to 81 Am. Dec. 536;
5 *Moore Dig. Int. Law,* 230-231.

In that case the remedy of one claiming the benefit of the treaty must be political as by way of protest or negotiation. It cannot lie in the Courts.

Many of the text-writers who ascribe almost unlimited jurisdiction to the treaty-making power are either unmindful of this distinction or they discuss the treaty-making power solely in its character as an inherent attribute of national sovereignty.

What, then, are the constitutional limitations on the authority of the President and Senate, as the treaty-making power in the United States, to legislate by treaties which the Courts shall enforce as the supreme law of the land?

"There are doubtless limits of this (the treaty-making) power", says the Supreme Court in

Hauenstein vs. *Lynham,* 100 U. S. at page 490,

"as there are of all others arising under such instruments" (as the Constitution).

We have assembled, for the information of the Court, the opinions in which an endeavor has been made to outline a rule by which the constitutionality of a treaty may be tested.

In *People* vs. *Naglee,* 1 Cal. at page 247, the Court said:

> "The Act, then, is not repugnant to that treaty. But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty,

the conclusion is not deducible that the treaty must, therefore, stand, and the State law give way. The question in such case would not be solely what is provided for by the treaty, but whether the State retained the power to enact the contested law, or had given up that power to the general government. If the State retains the power, then the President and Senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an Act of Congress which transcends the constitutional authority of that body, it cannot supersede a State law which enforces or exercises any power of the State not granted away by the Constitution. To hold any other doctrine than this, would, if carried out into its ultimate consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective States, or which should even undertake to cede away a part, or the whole of the acknowledged territory of one of the States to a foreign nation."

And the Court continues on page 248:

"It is not within the scope of a constitutional treaty to interfere with the reserved powers of taxation and of control over foreigners, which we have above discussed. No treaty, within our knowledge, has attempted to do it; and if such attempt should be made, the stipulation would, we apprehend, be neither recognized nor enforced by the supreme tribunal of the nation. 'If', says

> Chief Justice Taney (7 Howard, 466) 'the United States have the power, then any legislation by the State in conflict with a treaty or Act of Congress, would be void. And if the State possess it, then any act on the subject by the general government, in conflict with the State law, would also be void, and this Court bound to disregard it.'"

People vs. *Gerke*, 5 Cal. 383, was a case involving the constitutionality of a treaty removing the disability of aliens to inherit. Justice Heydenfeldt, while upholding the treaty, said:

> "The language which grants the power to make treaties, contains no words of limitation; it does not follow that the power is unlimited. It must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the federal government would be ineffectual, and the reserved rights of the States would be subverted. This principle of construction as applied, not only in reference to the Constitution of the United States, but particularly in the relation of all the rest of it, to the treaty making grant, was recognized both by Mr. Jefferson and John Adams, two leaders of opposite schools of construction. See Jefferson's Works, vol. III p. 135; and vol. VI, p. 560."

Judge Heydenfeldt (page 384) adopts Calhoun's definition of the limits of the treaty-making power under the Constitution. He says, in the opinion:

> "Mr. Calhoun, in his discourse on the Consti-

tution and Government of the United States, has given to this power a full consideration, and I cannot doubt that the view which I have taken, is sustained by his reasoning. According to his opinion, the following may be classed as the limitations on the treaty-making power: First, it is limited strictly to questions inter alios, 'all such clearly as appertain to it.' Second, 'By all the provisions of the Constitution which inhibit certain acts from being done by the government or any of its departments.' Third, 'By such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary.' Fourth, 'It can enter into no stipulation calculated to change the character of the government, or to do that which can only be done by the Constitution-making power; or which is inconsistent with the nature and structure of the government or the objects for which it was formed'.

"Having stated these as the only limitations, the author adds, 'Within these limits all questions which may arise between us and other powers, be the subject matter what it may, fall within the limits of the treaty-making power, and may be adjusted by it."

In *The License Cases*, 5 Howard at page 613, Justice Daniels, whose opinion is mentioned by the Supreme Court in *People* vs. *Naglee*, 1 Cal. 247, (supra) said, referring to the provision of the Constitution of the United States that treaties shall be the supreme law of the land:

"This provision of the Constitution, it is to be feared, is sometimes applied or expounded with-

out those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States', save what is derived mediately or immediately, and regularly and legitimately from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away one right of a State or of any citizen of a State. In cases of alleged conflict between a law of the United States and the Constitution, or between the law of a State and the Constitution or a statute of the United States, this Court must pronounce upon the validity of either law with reference to the Constitution; but whether the decision of the Court in such cases be itself binding or otherwise must depend upon its conformity with, or its warrant from, the Constitution. It cannot be correctly held, that a decision, merely because it be by the Supreme Court, is to override alike the Constitution and the laws both of the States and of the United States."

In *Turner* vs. *American Baptist Union,* 5 McLean 347, Fed. Cas. 14,251, it was held that a treaty is the

supreme law of the land in respect of such matters only as the treaty-making power, without the aid of Congress, can carry into effect. Where a treaty stipulates for the payment of money for which an appropriation is required, it is not operative in the sense of the Constitution. Every foreign government may be presumed to know that so far as the treaty stipulates to pay money the legislative sanction is required.

Professor Moore, in his *Digest of International Law*, Vol. 5, groups a number of opinions from eminent students of the American government on the confines of the treaty-making power.

> Mr. Jefferson to Mr. Monroe, Mar. 21, 1795, 4 Jeff. Works, 134. 5 *Moore*, 225.
>
> "We conceive the constitutional doctrine to be that though the President and Senate have the general power of making treaties, yet wherever they include in a treaty matters confided by the Constitution to the three branches of the legislature, an act of legislation will be requisite to confirm these articles, and that the House of Representatives, as one branch of the legislature, are perfectly free to pass the act or to refuse it, governing themselves by their own judgment whether it is for the good of their constituents to let the treaty go into effect or not. On the precedent now to be set will depend the future construction of our Constitution, and whether the powers of legislation shall be transferred from the President, Senate, and House of Representatives, to the President and Senate, and Piamingo, or any Indian, Algerine, or other chief."

Mr. Blaine, Secretary of State, wrote, March 25, 1881 (For. Rel. 1881, 335, 337) to Mr. Chen Lan Pin, that a treaty, no less than the statute law,

> "must be made in conformity with the Constitution, and where a provision in either a treaty or a law is found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the government and the nation."

An instructive opinion is that of Dr. Meier, of the University of Halle. We quote from Moore's Digest. (5 Moore, 170-171.)

> "That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition which it has received from no writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the treaty-making power be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives. The Constitution gives Congress the control of the army. Participation in this control would be

snatched from the House of Representatives by a treaty with a foreign power by which the United States would bind itself to keep in the field an army of a particular size. The Constitution gives Congress the right of declaring war; this right would be illusory if the President and Senate could by a treaty launch the country into a foreign war. The power of borrowing money on the credit of the United States resides in Congress; this power would cease to exist if the President and Senate could by treaty bind the country to the borrowing of foreign funds. By the Constitution "no money shall be drawn from the Treasury, but in consequence of appropriations made by law;" but this limitation would cease to exist if by a treaty the United States could be bound to pay money to a foreign power. . . . Congress would cease to be the law-making power as is prescribed by the Constitution; the law-making power would be the President and the Senate. Such a condition would become the more dangerous from the fact that treaties so adopted, being on this particular hypothesis superior to legislation, would continue in force until superseded by other treaties. Not only, therefore, would a Congress consisting of two houses be made to give way to an oligarchy of President and Senate, but the decrees of this oligarchy, when once made, could only be changed by concurrence of the President and of a Senatorial majority of two-thirds.'"

"Wharton, Int. Law Digest, par. 131a, I 26, citing Uber den Abschluss von Staatsvertragen, con Dr. Ernest Meier, Professor der Rechte an der Universitat Halle; Leipsig, 1874."

These authorities agree that a treaty which invades the rights reserved to the States and affects to legislate concerning matters exclusively within the jurisdiction of the State governments will not be enforced by the Courts under the Constitution, as the supreme law of the land. The next question is, then, whether the right to prescribe who shall be appointed administrator of estates is one of the rights reserved to the State governments.

There is no federal law of administrations and the administration of estates is a matter customarily left to the States. The right to control the administration of estates has not been expressly delegated in the Constitution to any branch of the federal government.

The Supreme Court of the United States in

Frederickson et al. vs. *Louisiana,* 23 How. 445;
and in
Mayer vs. *Grima,* 8 How. 490,

holds expressly that the power to regulate the administration of estates is one of the reserved rights of the States. In the Frederickson case the Court, in construing a treaty between the United States and Wurtemberg, says, p. 447:

> "The court, in *Mayer* vs. *Grima*, 8 How. S. C. R. 490, decided that the act of the Legislature of Louisiana was nothing more than the exercise of the power which every State or sovereignty possesses of regulating the manner and terms upon which the property, real and personal within its dominion, may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it."

Again the Court says (p. 448),

> "It has been suggested in the argument of this case, that the Government of the United States is incompetent to regulate testamentary dispositions or laws of inheritance of foreigners, in reference to property within the States.
>
> "The question is one of great magnitude, but it is not important in the decision of this cause, and WE CONSEQUENTLY ABSTAIN FROM ENTERING UPON ITS CONSIDERATION."

If the treaty-making power can take away from the State the right to provide for the administration of estates within its territorial jurisdiction then there are no reserved rights in the States as against the treaty-making power and the treaty-making power may overturn our entire scheme of government. Is every reserved right of the State subject to extinction by the treaty-making power? The State has the right to provide for the qualifications of its own State officers; can this be destroyed by the treaty-making power? Can the treaty-making power provide that an officer of a State need not be a citizen of the State? Can it provide that he need not take the oath of allegiance to the Constitution of the State, even though the State law provides that he must? Before letters of administration are issued in California the administrator subscribes to and takes the following oath:

> "I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California; and that I will faithfully discharge the duties of adminis-

trator of the estate of————deceased according to law."

A consul of a foreign nation, being an alien, cannot take such an oath of allegiance. Can the treaty-making power deprive the State of authority to require such an oath from the administrator of an estate within its territorial jurisdiction? If the treaty-making power can go so far, can it not decree that an alien may hold any office in the government of a State, contrary to the express provisions of the law of the State, and that the alien, when an officer of the State, need not take the oath of allegiance provided by the law of the State? Where shall the limit be placed?

If the treaty-making power has authority to interfere in the administration of estates of which the State has jurisdiction and to set aside the authority of the State to provide for the qualifications of the administrators of estates, including their oath of office, are we not driven to the conclusion that there is *no limit* to the treaty-making power; that it is *absolute,* and that, as against it *there are no reserved rights of States?*

An administrator is an officer of the Court of the State appointing him. The law of the State provides who shall be administrator, how he shall be appointed, the oath he must take, and how he must qualify, just as it provides similarly with regard to all its officers, appointive and elective. If the treaty-making power may set aside these provisions of the State law what sovereign powers are left to the State? If the treaty-making power may set aside these provisions of the

State law then it may provide, without limit or restriction, that a consul of a foreign nation may be governor of a State, that he may be a judge of a Court, that he may hold any office in the State and that he need not, to hold such office, take the oath to uphold the laws and Constitution of the State. Such latitude allowed to the treaty-making power must lead to chaos in the government of the State, reduce the States to the condition of mere administrative departments or provinces of the federal government, and render the House of Representatives a futile superfluous assembly.

Would not a provision in a treaty taking from the State, in certain cases, the right to provide for the administration of estates within its jurisdiction and providing that the administrator need not take the oath required by the State and providing, further, that the law of the State regulating the appointment and qualifications and oath of office of the administrator does not apply to the estates of aliens, be in Calhoun's words, quoted above, and approved by the Supreme Court of California, "inconsistent with the nature and structure of the government" and "the objects for which it was formed"?

Counsel for appellant, the Italian Consul General, will urge, in reply to this argument, that the right of the federal government to legislate by treaty concerning the succession of the estates of aliens has been affirmed in *Chirac* vs. *Chirac, Hauenstein* vs. *Lynham,* and *People* vs. *Gerke,* and, therefore, is no longer an open question; and that the administration of estates

is a matter no more exclusively reserved to the States than the succession to estates.

It will be noted, however, that none of these cases goes so far as the Italian Consul General would go in the case at bar. The treaties upheld in the cases cited by opposing counsel did no more than remove DISABILITIES imposed on aliens by State laws in the matter of inheriting real property; but no Court has sustained a treaty which goes so far as to confer on an alien SPECIAL PRIVILEGES AND ADVANTAGES withheld from citizens of the United States. It is one thing to place aliens on an equality with citizens before the law. It is quite another thing to give them preference over citizens before the law. It is one thing to provide that aliens may inherit equally with citizens. It is indeed a different thing to provide that an alien shall have the right to administer on a certain class of estates in priority to the heirs and next of kin who are citizens of the United States and resident here.

While the decisions in *Ware* vs. *Hylton*, and *Chirac* vs. *Chirac*, together with the few early cases in which those decisions have been followed, have not yet been overruled, the weight of professional and political opinion appears to be that the Court in those cases stretched the treaty-making power to the limit of its elasticity, and that to go beyond those decisions would be a grave injustice to the States. Mindful of the criticism which those decisions have received, and not convinced that they were sound, the State Department has declined all overtures from foreign governments to repeat in subsequent treaties the provisions concerning

inheritances which were declared valid in those cases.

Mr. Bayard, Secretary of State, writing to Mr. Miller, June 15, 1886, in the letter quoted above (160 MS. Dom. Let. 481 to be found in the archives of the State Department), said:

> "Were the question whether a treaty provision which gives to aliens rights to real estate in the States to come up now for the first time, grave doubts might be entertained as to how far such a treaty would be constitutional. A treaty is, it is true, the supreme law of the land, but it is nevertheless only a law imposed by the federal government, and subject to all the limitations of other laws imposed by the same authority. While internationally binding the United States to the other contracting powers, it may be municipally inoperative because it deals with matters in the States as to which the federal government has no power to deal. That a treaty, however, can give to aliens such rights, has been repeatedly affirmed by the Supreme Court of the United States (see *Chirac* vs. *Chirac*, 2 Wheat. 259; *Carneal* vs. *Banks*, 10 Wheat. 181; *Hauenstein* vs. *Lynham*, 100 U. S. 483); and consequently, however much hesitation there might be as to advising a new treaty containing such provisions, it is not open to this department to deny that the treaties now in existence giving rights of this class to aliens may in their municipal relations be regarded as operative in the States."

When, a little less than three years later, it was proposed that the United States, by a reciprocity arrangement with Brazil, should concede to Brazilian consuls

in the United States a qualified right to ADMINISTER, Mr. Bayard, writing to the American Minister to Brazil, Mr. Armstrong, January 30, 1889 (No. 137, MS. Inst. Brazil, XVII, 393, to be found in the archives of the State Department), declared that the government of the United States had no power to provide by treaty for the administration of estates by Brazilian consuls in this country because "each State, under our system, has exclusive jurisdiction over the administration of property of persons, whether foreigners or citizens, dying within its limits". For the convenience of the Court we quote in full Mr. Bayard's letter from the copy received by us from the Department of State:

"No. 137 Department of State,
"Washington, January 30, 1889.

"H. C. Armstrong, Esqr.,
"etc., etc., etc.

"Sir:

"In your despatch No. 168 of 21st December last, you advert to difficulties attending the administration under existing Brazilian decree No. 2433 of June 15, 1859, of estates of Americans dying in Brazil,—the want of security from unjust claims against them, and the absence of any rights of intervention or protection in the premises by the consuls of the United States, which subjects have heretofore been the occasion of correspondence with the department, to which you refer. You report that you had on the date of your dispatch a conversation on the general subject with the Brazilian Minister for Foreign Affairs, who furnished you with a copy of decree No. 855 of November 8, 1851, 'regulating the rights and privi-

leges of foreign consuls in the empire and their action in case reciprocity exists in administering on the estates of the citizens of their countries,' and informed you that 'to share its benefits it was only necessary for the Government of the United States to "petition" to be put under it and that it would be promptly done'.

"On turning to the decree I find that the articles relating to the estates of foreigners dying in Brazil are Nos. 2, 3, 4, 5, 6, 7, 8 and 11, as to which it is provided by Article 24, that they 'will enter into execution with regard to the consular agents and subjects of any nation only after reciprocity in virtue of an agreement between that nation and Brazil shall have been established by means of,' an exchange of notes, 'and a decree shall have been issued in consequence by the imperial government ordering them to be executed'.

"The 'petition' therefore, of which you speak, must, I apprehend, be considered as amounting to an accession by the Government of the United States, to a reciprocity convention embracing the articles so designated. But even were this government to be admitted to the benefit of these articles on a mere 'petition', supposing such a proceeding to be consistent with our political system, the 'petition' should not be made by the government if the provisions of these articles could not be accepted by it. The basis of the decree is reciprocity. If the United States cannot give Brazil in this direction, what Brazil offers to give, then we cannot ask for the privileges,—if they be such,—here tendered by Brazil.

"A brief notice of the articles in question will show that this government could not by federal

powers of any kind, give to Brazilian subjects the privileges here proposed to be given by Brazil.

"Article 2 vests in 'the judge of the Probate Court' under certain circumstances acting with 'the Consular Agent' the administrative control of a foreigner's estate. (Italics ours.)

"Article 3 determines in what way the estate in such cases is to be advertised, and to be kept, subject to taxes until the period of distribution arrives.

"Article 4 authorized the Consular Agent where the estate is liquidated, to deliver it 'to the person or persons entitled to it in conformity with the instructions which he shall have received, being then considered by the Courts of the country as the representative of the heir or heirs to whom he alone will be responsible.'

"Article 6 provides that in default of a Consular Agent, the Probate Judge shall take charge of his estate.

"It is not necessary to go further in analysing this decree. It is sufficient for me to say that in the opinion of this department anything like an adoption of it as the basis of a reciprocity convention between the United States and Brazil, is open to the following decisive objections:

"1. *The Government of the United States has no power to establish by treaty, provisions such as the above, in relation to Brazilian subjects dying in any of the States of our Union. Each State, under our system, has exclusive jurisdiction over the administration of property of persons, whether foreigners or citizens, dying within its limits.* (Italics ours.)

"2. The provisions of the articles of the decree in question, conflict with principles of jurisprud-

ence which, so far as I am advised prevail in every one of our States.

"(a) The decree contains no provision requiring security to be given by foreign consuls proposed as administrators to one of their countrymen.

"There is no State in our Union in which such security would not, if asked, be required, and to exempt consuls from giving security would conflict in my view, with our entire system of decedent administration. (b) The administration the decree provides for is principal. By the rules of international law recognized throughout the United States, the administration taken out to the estate of a mere transient resident is ancillary to the administration to be appointed in his domicil. (c) Most of our States have statutory provisions which conflict with the articles above noted. In some States public administrators are appointed to take cognizance of estates in which there is no administrator designated by heirs or leading creditors. In other States by local practice the local consul of the decedent's country is permitted to administer. But in all our States, so far as distribution of property is concerned, the *lex situs* by a settled rule of the law of nations is held to prevail as to realty and the *lex domicilii* as to personality. Article 4 above referred to, contains no such provision. If we assent to it, we shut ourselves out from claiming the rights of the *lex domicilii* for American citizens dying in Brazil.

"I conclude therefore that the United States cannot agree to accept the Brazilian decree, above quoted, as the basis of a reciprocal arrangement with that country, first, because the federal government has no power to impose such regulations

on the States and secondly, because the provisions in question, if correctly understood conflict with provisions which are settled rules of succession, as established in all our States.

"As regards your observations on the mismanagement of the estates of American citizens dying in Brazil, I conclude that even if this decree were embodied in a treaty and thereby became applicable to Americans in Brazil, the unrestrained power it gives consuls and judges of probate would not remove the evils it proposes to cure. At present, if injustice is done in Brazil in the distribution of the estate of an American citizen there dying, the remedy is an appeal to this department which will intervene and secure for that estate the protection which, by the rules of international law, the *lex domicilii* of the decedent gives.

"I am, etc.,

"T. F. BAYARD."

In February, 1870, Hamilton Fish, the Secretary of State, wrote to Count L. de Colobiano, representative of Sardinia, an official letter (MS. notes to Italy, VII 53) in which he said:

"You will doubtless observe that the Supreme Court in the case of Frederickson before referred to, reserves the question whether the Government of the United States is competent to regulate, by treaty or otherwise, testamentary dispositions or laws of inheritance of foreigners in reference to property within the States. This question, which in the case cited, related to movable property and is said by the Court to be one of great magnitude, is even more serious when it relates to real estate.

> The federal government has generally gone no farther in its treaties on this subject than to engage to recommend suitable legislation to the States. Its own power to control the matter by treaty has never been the subject of adjudication in the Courts and must be regarded as questionable."

Secretary Hay, also, appears to have deemed that the treaty-making power had gone too far for Moore relates, Vol. 5, pages 164-165, that

> "July 19, 1899, the Department of State declined a proposal of the British Government to negotiate a treaty to prevent discriminatory legislation by the several States of the United States, subjecting foreign fire-insurance companies to higher taxes than domestic companies. The reason given for the declination was that the negotiation of such a treaty would probably be futile on account of the indisposition of the people to permit any encroachment upon the exercise of powers of the local legislation.
>
> "Mr. Hay, Sec. of State, to Mr. Tower, British charge, July 19, 1899, For. Rel. 1899, 347."

Some instructive remarks are contained in Secretary Marcy's note to Mr. Aspurda, representative of Venezuela, written Nov. 15, 1854 (MS. notes to Venezuela, I 35), in which he holds that the President and Senate have not authority to define piracies by treaty for the reason that the Constitution says that *Congress* shall "define and punish piracies and felonies committed on the high seas" and that authority so delegated to Congress is exclusive.

In connection with Mr. Marcy's note to Mr. Aspurda, it is significant that Article I of the Constitution of the United States which, in section 10, confers on Congress power "to define and punish piracies" confers also on Congress in section 3 power "to regulate commerce with foreign nations". The Argentine treaty of 1853 is *exclusively* a regulation of commerce with a foreign nation. Consuls are merely commercial, as distinguished from diplomatic agents (1 *Kent* 42; 5 *Moore Dig. Int. Law* 32 et seq.). It has been held that money cannot be appropriated by treaty because that power is delegated to CONGRESS by the Constitution.

> *Turner* vs. *American Baptist Union*, 5 McLean 347, Fed. Case 14,251,

quoted supra. It is, therefore, a grave question whether the Argentine treaty, there having been no ratification of it by CONGRESS, has ever been or is now the law of the land under the Constitution.

Although the United States has made numerous commercial treaties it has been long a mooted question, which, however, has never come to an issue before the Courts, whether such treaties are valid without the assent of Congress; that is, of the House of Representatives as well as of the Senate; since the power to regulate foreign commerce, like the power to define piracy, is expressly delegated to Congress.

> *Story on The Constitution*, Vol. 2, page 607, section 1841;
>
> *Butler on the Treaty-Making Power*, Vol. 1, page 432, and particularly Mr. Tucker's remarks quoted on page 438;

Crandall on Treaties, 135-140;
Moore's Dig. Int. Law, Vol. 5, pages 223-225, where some discussions of the question are reported.

We prefer, however, to indicate rather than argue this important point for the provision of the Argentine treaty which, according to the Italian Consul General, gives him a right to letters of administration is so clearly, to our minds, an invasion of the reserved rights of the States that there is no need to make any further answer to his contention. If the granting of letters of administration can be regulated by treaty, then all the internal business of the States, the expenditure of their taxes, the administration of their schools, the elections of their public officers, every affair of the citizen, the municipality, and the State government, is subject to control by treaty; and the United States in that case is governed despotically, no matter how beneficently, by the President "by and with the advice and consent of the Senate".

Our interpretation of the Argentine treaty seems to us so obvious and indisputable, our statement of the application of the "most favored nation" clause in treaties seems to us so firmly settled by authority and so consistent with reason, and our contention that it is beyond the power of the federal government to regulate by treaty the administration of decedents' estates seems to us so strongly supported by consideration of the nature and theory of the Union and by the expressions of authority, of learning, and of sound reason on the subject,

that we should not have ventured to occupy the Court's time with so lengthy a brief were it not for the fact that the *Wyman* case, decided by the Supreme Court of Massachusetts, and the *Fattosini* and *Lobrasciano* cases, decided by the surrogate of Westchester County, New York, stand in the books as authorities for the contention of the Italian Consul General.

Respectfully submitted,

EUSTACE CULLINAN,

Attorney for George F. Thompson, Defendant in Error.

Dated, November 22, 1910.

10

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 292.

SALVATORE L. ROCCA, PLAINTIFF IN ERROR,

against

GEORGE F. THOMPSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

FREDERIC R. COUDERT,
CHARLES CHEYNEY HYDE,
Counsel for Plaintiff in Error.

(22,182)

SUPREME COURT OF THE UNITED STATES.

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SALVATORE L. ROCCA, PLAINTIFF IN ERROR,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

I.

The Purpose of the treaty clauses in question cannot be defeated by forbidding consular officers to administer.

The theory constantly advanced by counsel for the public administrator as well as by the Supreme Court of California that any "intervention" will

suffice that falls short of administration is completely met by consideration of existing conditions respecting the aliens of a single country, namely, those of Italy. The estates of a large portion, if not the majority, of Italians resident in the United States, and sufficient in importance to call for administration, are those of victims of accidents, where the chief assets are claims for indemnity against negligent wrongdoers. In States such as Illinois, where the consular right to administer is not recognized, there is sharp competition between the consulate of Italy and the personal-injury lawyer for the control of the case of a decedent whose family lives in Italy. The public administrator, given by local statute a definite right to administer in preference to all other persons who are not resident heirs, complacently watches the contest, and with great condescension regards the particular case in which an Italian is killed as a consular or non-consular case, according to the test of priority. That is, if the consulate reports the death of a countryman before the personal-injury lawyer, it becomes a matter for the consular attorney to care for. If the personal-injury lawyer anticipates the consulate, the case belongs to the former. In case of a contest the public administrator simply asserts the Pauline command: "So run that ye may obtain." The winner in the contest is, however, obliged to fortify himself with a power of attorney. Thus, if a case is reported by the Italian consulate to the public administrator

and the two offices act in harmony, the consulate will be deprived of the right of directing by its attorneys litigation of the claim against a negligent corporation, if a personal-injury lawyer, or his local client who may be unrelated to decedent, receives a power of attorney from the non-resident heirs. This situation constantly arises and operates disastrously with respect to the interests of such heirs. The personal-injury lawyers, so-called, are of a relatively low grade in point of legal training and legal ethics. Lacking the respect of counsel for corporate interests that are commonly defendants, the former are very frequently totally unable to secure adequate settlements of meritorious cases by any process. If litigation ensues, both trial and appellate court work is poorly conducted. The matter of settlement is regulated primarily by the desires or needs of the attorney rather than of the client. When settlement is effected, distribution is made of the distributive portions of the non-resident heirs to the donee of the power of attorney. It is true that there are able and conscientious personal-injury lawyers in Illinois as in other States that form a notable exception to the general rule. On the other hand, the non-resident heirs of an Italian victim of an accident in Illinois find themselves also victims of a system that the Italian consulate itself is obliged to tolerate. It is idle to maintain that by mere watchfulness through any intervention that is not administra-

tion, the consul can protect the interests of his non-resident countrymen.

On the other hand, in States such as Ohio, where in the absence of any conflicting local statutes the consular officer is permitted to administer, by virtue of the Argentine treaty, complete justice may be had. At Cleveland, for example, a city which is within the district of the Chicago consulate, the consular agent is commonly appointed administrator of Italian estates which are brought to him voluntarily and without effort on his part by friends of victims of accidents. Through the aid of a most competent attorney of highest character litigation is conducted with the best results, large indemnities secured, which are paid direct through the consulate at Chicago to the Italian foreign office, and there distributed to heirs resident in that country. *The present situation in Ohio and Illinois is an apt illustration of the actual power and success of an Italian consul in protecting the estate of his deceased countryman in commonwealths where he is permitted to administer, and in those where he is given something less.*

II.

The Interpretation of the Argentine Treaty.

The chief legal problem is that of interpretation. The interpretation of treaties involves a twofold inquiry; first, one relating to the sense which the contracting parties attached to the language employed; secondly, one relating to evidence as to that sense. It may be observed that there is no rule of international law that prevents contracting States from using terms in any sense they see fit. Thus they may attach to phrases a signification known only to themselves; or one of a technical character; or one that corresponds to ordinary colloquial usage. By reason of this entire freedom, the importance of the second aspect of the general inquiry becomes obvious. The real problem before us, which is the common problem in questions relating to the interpretation of treaties, is one concerning proof that the parties intended to use the language employed in a particular way. In a word, did the Argentine Republic and the United States intend in 1853, through the medium of Article IX of the treaty, to give to consular officers the right to administer? This is a question of fact. It is not to be ascertained by reference to the effect of consular administration upon the affairs of a particular commonwealth. It is not to be tested by reference to Spanish or English dictionaries.

The solution must be sought through official documents that show in fact the purposes of the high contracting parties at the time when the agreement was concluded. There is no satisfactory statement (satisfactory in the sense that it is enlightening) which has been made by any responsible official of the Department of State which purports to construe the treaty. Too great stress has been laid upon the letter of Secretary Hay to Senator Wolcott of February 3, 1900. (Moore Dig., v. 123.) It may be observed that Mr. Hay did not specifically refer to the Italian treaty or to the Argentine treaty; and careful examination of the texts of the conventions to which he referred indicates in some instances, at least, provisions that are divergent from those that are contained in the Italian treaty. To offset, however, any value that Mr. Hay's statement might be believed to possess, the commentary of Mr. Evarts when Secretary of State, February 4, 1879, when communicating to the American Minister to the Argentine Republic, is entitled to greater weight. The latter, in connection with another matter, says: "Considering the terms of Article IX of the treaty of 1853 give the consul the right to administer the property, etc." (Moore Dig., v. 120.) Thus Mr. Evarts interprets the right of intervention as a "right to administer."

If we examine the archives of the Argentine Republic we find more light. On September 29, 1865, that country passed a law respecting the testa-

mentary or intestate property of foreigners. (See Appendix I.) Provision was made for the consul of a deceased foreigner's nation to "intervene in the arrangement of his affairs," when such decedent died intestate, and under certain circumstances, when he died testate. Article III of the law contains the following provision:

"Consular intervention shall be confined to: 1st. Sealing up the goods, furniture, and papers of deceased, after giving due notice to the local authorities, provided always that the death has taken place within the consular district. 2nd. *Appointing executors.*"

This provision has special significance by reason of the fact that Article XIV of the law refers specifically to the existing treaties of Argentina. (See Appendix I.) Here we have what seems to be authoritative data as to the sense which one of the contracting parties attached to Article IX of the treaty of 1853. The relatively short interval of time between the exchange of ratifications, which took place in 1854, and the enactment of the law in question gives to the latter the force of a contemporaneous explanation. Here we have for the first time the definition of "consular intervention." Can there be the slightest doubt that in view of the subject-matter of the law and the reference to existing treaties, the Argentine Government believed that the right of intervention expressed in the treaty signified something different

or less than the right of intervention as defined in the statute? To express it differently, is not the law of 1865 declaring that "consular intervention" embraced the right of "appointing executors" solid proof in support of the contention that the right of consular intervention contained in the treaty was intended to include the right to control administration?

FREDERIC R. COUDERT,
CHARLES CHEYNEY HYDE,
Counsel for Plaintiff in Error.

Appendix I.

Law of the Argentine Confederation, Respecting the Testamentary, or Intestate, Property of Foreigners,—Buenos Ayres, September 29, 1865. English translation published in Vol. 58, British and Foreign State Papers, p. 455.

ART. I. When any foreigner dies intestate without leaving a wife or lawful heirs publicly recognized as such and residents in the Republic; or when he dies leaving a will, and the heirs are foreigners absent from the country and the executor also absent, the Consul of such deceased foreigner's nation shall have a right to intervene in the arrangement of his affairs.

II. No intervention shall take place on the part of Consuls if any Argentine, notoriously known as such, be heir either by descent or assent.

III. Consular intervention shall be confined to—1st. Sealing up the goods, furniture, and papers of deceased, after giving due notice to the local authorities, provided always that the death has taken place within the Consular district. 2nd. *Appointing executors.*

IV. The Consuls shall at once communicate to the testamentary Judge the appointment of such executors.

V. The local authority shall put its seal on the effects and papers of the deceased, and take the necessary steps for their security.

VI. The double seal cannot be removed for the Judge to make the inventory, without previously summoning the executors.

VII. If there be no Consuls at the place of the intestate's decease, the inventory shall be made according to the existing laws of the country, in pres-

ence of two witnesses of the same nation as the deceased, or of another nation if there be none such, and the authority making such inventory must send a report thereof to the nearest Consul.

VIII. The executors shall perform their charge in accordance with the laws of the country.

IX. In case of legitimate collateral heirs existing in the country, they shall have the right to demand of the proper judge the appointment of executors, whereupon those named by the Consul shall become merely representatives of the absent heirs not specially represented.

X. If there be no heirs in the country, and claims should arise for debts or right of succession, these shall be decided by the proper judge with the intervention of the executors.

XI. Absent heirs cannot receive anything until a year after the death of the intestate, and when all debts contracted within the Republic have been paid.

XII. If there be no heirs ab intestato according to the laws of the country, the property of the deceased shall be delivered to the State.

XIII. The rights granted by this law shall only be in favor of those nations which cede equal privileges to Argentine Consuls and citizens.

XIV. Foreign nations demanding the fulfilment of anything included in this law, *and which may be also stipulated in Treaties already concluded, shall only be entitled to obtain what is exclusively stipulated in the Treaty.*

XV. Let this be communicated to the Executive.

Given in the Sessions Hall of the Congress at Buenos Ayres, on the 29th day of September, 1865.

VALENTIN ALSINA.
JOSE E. URIBURU.

Appendix II.

Art. XIII of Treaty of Peace and Commerce between the Argentine Republic (United Provinces of Rio De La Plata) and Great Britain, February 2, 1825, published in Tratados De La República Argentina, 1901, I, 15.

ART. 13. It shall be free for the subjects of His Britannick Majesty, residing in the United Provinces of Rio de la Plata, to dispose of their property of every description by will or testament, as they may judge fit; and in the event of any British subjects dying without such will or testament in the territories of the said United Provinces, the British Consul General, or, in his absence, his representative, shall have the right to *nominate curators to take charge of the property of the deceased, for the benefit of his lawful heirs and creditors,* without interference, giving convenient notice thereof to the authorities of the country; and reciprocally.

Appendix III.

Concerning the establishment of the reciprocal rights of intervention of Consuls in Spain and the Argentine Republic as provided in Article XIII of the Argentine law of September, 1865, see correspondence in Tratados De La República Argentina, 1901, I, 156-161.

Concerning similarly, the establishment of such rights in France and the Argentine Republic according to Article XIII of the same law, see idem I, 324; also Vol. 92, British and Foreign State Papers, page 852.

Appendix IV.

Treaty of Commerce between the Argentine Republic and Sardinia, September 21, 1855, Article X, published in Vol. 53 British and Foreign State Papers, page 942.

X. Si quelque citoyen d'une des deux Parties Contractantes venait à mourir sans testament dans le territoire de l'autre partie, le Consul-Général, Consul ou Agent Consulaire de la nation à laquelle appartenait le défunt, ou dans leur absence le représentant du dit Consul-Général, Consul et Agent Consulaire aura le droit *de prendre part à la prise de possession, administration et liquidation judiciaire des biens du défunt suivant les lois du pays, dans l'intérêt de ses créanciers et héritiers légitimes.*

Appendix V.

Treaty of Peace and Commerce between the Argentine Republic and Chili, August 30, 1855, Article XXVI, published in Tratados De La República Argentina, I, p. 84; English Translation published in Vol. 49, British and Foreign State Papers, 1207.

In the case of a citizen belonging to the nation of the Consul dying without executor or heir in the territory of the Republic, the representation of the estate shall, for the better security of the property, devolve upon the Consul, conformably to the laws of the Republic in which he resides; he can add his seals to those placed by the local authority, and when the time comes for them to be removed, he ought to be on the spot on the day and at the hour

fixed by the local authority, but his absence at the time so appointed cannot suspend the legal proceedings of the local authority.

In the case of one of his fellow-countrymen dying intestate, the Consul [may take part in]* drawing up the inventories, making the valuations, appointing a depositary, and other similar acts having for their object the preservation, administration, and liquidation of the property. The Consul shall be, of right, the representative of any one of his countrymen who may have an interest in the succession to an estate, and who being absent from the place where it occurred, has no regularly constituted agent or attorney. As such representative he shall exercise all the rights of the heir himself, except that of receiving the money and effects of the succession, for which a special order is always necessary. The said money and effects, so long as no such attorney or agent is appointed, must be deposited in a public bank or in the hands of a person approved of by the local authority and the Consul. The judge, upon the Consul's petition to that effect, can order the sale of such hereditary movable property as is liable to become deteriorated, and the deposit of the proceeds arising from such sale in a public bank; but a like disposition with respect to the other property cannot be adopted until after four years have expired since the death of the former owner without any heir having come forward.

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* It is believed that this English translation is quite inadequate. The words in the second paragraph "may take part in" purport to be a translation of the word "intervenir" in the original Spanish text.

Appendix VI.

THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, November Term, 1910-11.

6 Div., 111.

FRANK CARPIGIANI
v.
E. D. HALL *et al.*

Appeal from Jefferson Probate Court.

SOMERVILLE, *J.:*

Francesco Santangelo, a citizen of Italy, died intestate on or about March 30, 1910, in Jefferson County, Alabama, where he was then residing, leaving personal property valued at about $50.00, and contingently a right of action in his personal representative against a corporation for the injuries that caused his death.

On April 15th, 1910, a petition was filed in the probate court by E. D. Hall and Virga Giuseppe, as *friend and relative* of the deceased, which, in addition to the usual jurisdictional averments, recited that the names of the heirs and distributees of the decedent's estate, so far as known, are "Virga Giuseppe, cousin and nearest relative in America."

On the same day—April 15th—letters of administration were issued to these two petitioners

jointly, they having qualified by filing the required bond.

On April 19th, 1910, Frank Carpigiani filed his petition in the probate court stating under oath that he is a consular agent of Italy at Birmingham, Ala., and as such empowered to look after the estates of Italian subjects who die intestate in Jefferson County; that Francesco Santangelo was a subject of the Kingdom of Italy at the time of his death, which occurred on or about March 30, 1910, and less than forty days prior to the filing of this petition; that deceased left no wife or children, but is survived by his father and mother who reside at Salaparuta, Italy; that the petition of E. D. Hall and Virga Giuseppe (a copy of which is made an exhibit) was not for the benefit of the estate or heirs of the deceased, but was for the fraudulent purpose of appropriating the funds of the estate to their own use, in furtherance of which scheme Virga Giuseppe had falsely and fraudulently represented himself to be a relative of the deceased, when in fact he was in no way related to him.

The prayer of the petition is that Hall and Giuseppe be cited to appear and show the cause why they should not be removed from the administration and their letters revoked and that upon such hearing they be removed and their letters revoked and that the petitioner, Carpigiani, be appointed as administrator in their stead.

Citations were issued as prayed for, in response to which Giuseppe filed a sworn answer confessing the fraud and falsehood charged in the petition, renouncing his claim, and consenting that an order be made removing himself and Hall, and revoking their letters.

Hall interposed a demurrer to the petition on the ground that it did not show that the petitioner was in any way interested in the estate, nor that he

had any lawful authority to represent any of the estate, nor that he had any lawful authority to represent any of the persons in interest, nor that he had any standing to maintain the petition; and because no sufficient reason was shown for the revocation of the letters issued, nor for the removal of the administrators.

The probate court sustained the demurrer, and denied the petition, from which decree the petitioner, Carpigiani, appeals to this court.

1. The grant of administration having been made before the lapse of forty days, and it appearing that the intestate's father survived him, the grant was premature and improvident; and the court would have been authorized *ex mero motu* to revoke the grant. And, upon the timely application of any person having a prior right to administration, it was the duty of the court to do so.—*Koger v. Franklin*, 79 Ala., 505; Markland *v.* Albes, 81 Ala., 433. The fact that the intestate's father was a non-resident did not disqualify him for the office of administrator, if he chose to undertake it.—*Fulghum v. Fulghum*, 119 Ala., 403.

2. The rights and privileges of consuls rest on the general law of nations as well as on treaty stipulations.—2 Opinions of Atty. Gen. U. S., 378. In his treatise on Public International Law, p. 356, Mr. Taylor states that one of the duties attaching to the consular office is "to see that the laws of the state in which he officiates are properly administered when the rights of such (his) fellow citizens are involved." The duty, and by comity the authority of a consul to receive and care for the personal estate of citizens of his own country who may die within his consulate, and to protect the estate from spoliation, is prescribed and recognized by all civilized nations.—5 Moore's

Digest International Law, Sec. 722, p. 117; The Bello Corrunes, 6 Wheat., 152; Wheat. Int. Law (2nd ed.), 151; Woolsey's Int. Law., Sec. 96. Of the general propriety of such a practice there can be no possible doubt, and we are of the opinion that the appellant's intervention on the grounds set forth in his petition was no more than his official duty prescribed, and was authorized by the law and comity of nations. We mean to say only that he had a right to be heard on his petition, independently of treaty provisions, for the purpose of procuring the removal of these administrators if shown to be dishonestly conspiring to despoil the estate, or if they were improvidently appointed; and that this prerogative attaches by law to his consular office, without any special authority from those who are entitled to the estate.

3. The treaty of 1878 between Italy and the United States, of which we take judicial notice, contains the following provisions:

ART. IX. "Consuls general, Consuls, Vice-Consuls and consular agents may have recourse to the authorities of the respective countries within their district, whether Federal or local, judicial or executive, for the purpose of complaining of any infraction of the treaties or conventions existing between the United States and Italy as also in order to defend the rights and interests of their countrymen. If the complaint should not be satisfactorily redressed, the Consular Offices aforesaid in the absence of a diplomatic agent of their country, may apply directly to the government of the country where they reside."

ART. XVI. "In case of the death of a citizen of the United States in Italy, or of an Italian citizen of the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the

fact to consuls or consular agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested."

ART. XVII. "The respective consuls general, vice-consuls and consular agents, are likewise the Consular Chancellors, Secretaries, clerks or attaches, shall enjoy in both countries all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation."

U. S. Treaties 1904, p. 457.

Under the "most favored nation" clause in the above treaty, appellant makes reference to Article IX, of the treaty of 1853 between the Argentine Republic and the United States: "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul general or consul of the nation to which the deceased belonged, or the representative of said consul general or consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

U. S. Treaties 1904, p. 24.

It thus results that Article XVII of our treaty with Italy is to be read as if it conferred in specific terms all of the consular powers and privileges set out in Article IX of the Argentine treaty.

ART. VI of the Constitution of the United States declares: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States,

shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The final arbiter in all matters of constitutional interpretation is of course the Supreme Court of the United States, and that court, by Justice Field, has said of this provision: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation, and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subjects of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the government itself and of that of the States." *Geofroy v. Riggs*, 133 U. S., 258, 266. Undoubtedly, the consular prerogative of intervention in and administration of the estates of deceased foreign residents, as granted in Article IX of the Argentine treaty, is international in its character, and directly within the purview of the treaty power of the Federal Government, and is there-

fore binding upon all the courts of this State. We therefore hold that the Italian Consul, within the area of his consular territory, is entitled by supreme law to administer upon the estate of any Italian subject who there dies intestate, conformably, as to his general powers, obligation, and mode of procedure, with the statutes of the State.

These conclusions are fully and directly supported by the decisions of New York and Massachusetts.—*Estate of Tartaglio*, 12 Misc. Rep., 245; 33 N. Y. Supp., 1121; *In Re Fattosini*, 33 Misc. Rep., 18; 67 N. Y. Supp., 1119; Wyman, Petitioner, 191 Mass., 276; 114 Am. St. Rep., 601.

The case of *In Re Ghio's Estate* (*Rocca v. Thompson*) (*Cal.*), 108 Pac., 516, takes an opposing view, which must be regarded as erroneous.

The decree of the probate court is reversed, and the cause remanded for further proceedings in accordance with the foregoing opinion.

Reversed and remanded.

Simpson, McClellan and Mayfield, JJ., concur.

Appendix VII.

In Re Scutella's Estate.

(Supreme Court, Appellate Division, Fourth Department, May 3, 1911.)

1. Executors and Administrators (§24*) — Right to Administration—Italian Consuls.

The treaty of May 8, 1878 (20 Stat., 732), between the United States and Italy, by Article XVII, provides that the respective consuls shall enjoy in both countries all the rights and privileges which are or hereafter may be granted to the officers of the same grade of the most favored nation.

The treaty of July 27, 1853 (10 Stat., 1009), between the Argentine Republic and the United States, by Article IX, provides that, if any citizen of either country die without will in the territory of the other, the consul of the nation to which decedent belongs shall have the right to intervene in the administration of decedent's estate conformably with the law, for the benefit of creditors, etc. *Held*, that the Italian consul was entitled to letters of administration upon the estate of an Italian subject killed in this country, as against a creditor of decedent.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig., §24*.]

2. Treaties (§11*) — Operation — Inconsistent Laws.

Under Const. U. S., art. 6, §2, the courts of every State are bound by the provisions of treaties between the United States and foreign countries, though they conflict with the State constitutions or laws; the treaties being the supreme law of the land.

[Ed. Note.—For other cases, see Treaties, Cent. Dig., §11; Dec. Dig., §11*.]

Appeal from Surrogate's Court, Cattaraugus County.

In the matter of the administration of the estate of Frank Scutella. From a decree of the Surrogate's Court (69 Misc. Rep., 514; 127 N. Y. Supp., 874), directing the issuance of letters of administration, an appeal was taken. Reversed, and letters issued to appellant.

Argued before McLennan, P. J., and Spring, Williams, Kruse, and Robson, JJ.

Lanza & Miceli, for appellant.

Nevins & Black, for respondent.

Williams, J. The decree should be reversed, and letters issued to the appellant, upon his giving a bond, to be approved by the surrogate.

The deceased died as the result of an accident upon the Pennsylvania Railroad. His age does not appear. He left no will, no widow or children, but a father, mother, and one brother, residing in Italy, and one brother, living in Olean, Cattaraugus County, his only near relatives. He left little property, less than $50, in value, and there was the claim against the railroad company for causing his death. The respondent was a creditor of deceased, and had a claim against his estate of $42.60. He was a resident of this State, and made a petition for letters as such creditor. The deceased was a subject of the kingdom of Italy, and a citation was issued by the surrogate and served upon the appellant, the Italian consul, residing in Buffalo, to show cause why letters should not be issued to the petitioner. The appellant appeared on the return of the citation, and asked that letters be issued to him in preference to the petitioner. The facts were agreed upon as hereinbefore stated, and the decree appealed from was made after argument of counsel and an opinion written by the surrogate. The appellant did not and does not ask to be relieved from giving a bond as in case of a resident administrator.

(1) The appellant bases his right to administration upon the treaty between the United States and Italy. Article 17 of the treaty of May 8, 1878 (20 Stat., 732), provides that:

"The respective consuls general, consuls * * * shall enjoy in both countries, all the rights, prerogatives, immunities and privileges, which are, or may hereafter, be granted to the officers of the same grade of the most favored nation."

Under this article the appellant claims he is entitled to all the rights, privileges, and prerogatives extended to the consuls of the Argentine Republic under the treaty of July 27, 1853 (10 Stat., 1009), between that country and the United States. Article 9 of the latter treaty provides, viz.:

"If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul general or consul of the nation to which the deceased belonged, or the representative of such consul general or consul in his absence, shall have the *right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.*"

(2) These treaties are the supreme law of the land, and the judges of every State are bound thereby, anything in the Constitution or laws of any State to the contrary, notwithstanding. Section 2, art. 6, Constitution of the United States. The only question here involved is, therefore, the construction of these words "the right to intervene," etc., in article 9 of the Argentine treaty.

There have been several decisions by surrogates in this State upon this question, but none by any appellate court. It is therefore very proper that this court should indicate its views in the present case. In 1900, Surrogate Silkman, of Westchester county, held without any extended discussion that this clause gave the Italian consul prior right to administration. *In re* Fattosini, 33 Misc. Rep., 18; 67 N. Y. Supp., 1119. In 1901, Surrogate Thomas, of New York City, took occasion to disagree with Silkman, S., in the Fattosini case, and to hold that this clause did *not* give an Italian consul the prior right to administration. This discussion was more or less obiter, however, because he

granted administration to the consul in that case on other grounds. *In re* Logiorato, 34 Misc. Rep., 31; 69 N. Y. Supp., 507. In 1902, Silkman, S., again considered the question, and in an exhaustive opinion upheld his former decision, discussed the decision of Thomas, S., in the Logiorato case, and again held the consul had the prior right to administration. *In re* Lobrasciano, 38 Misc. Rep., 415; 77 N. Y. Supp., 1040.

I think this opinion should be followed by us, because the reasoning is sound and unanswerable. I do not need to quote from it here, or to reiterate in my own language the argument there made. It is in the reports, and may be read there. In 1907, Surrogate Van Duzee, of Albany County, followed Silkman, S., in the Lobrasciano case, and granted administration to the consul, in preference to a brother and creditor of the deceased, saying this course had been the practice of his court for many years, and had been adopted by many jurisdictions in this State and in Massachusetts, citing McEvoy *v.* Wyman, 191 Mass., 276; 77 N. E., 379, and *In re* Silvetti, 66 Misc. Rep., 394; 122 N. Y. Supp., 400. In the McEvoy case, above referred to, and *In re* Arduint, 9 Ohio, N. P., 369, the views of Silkman, S., were approved and followed. Davie, S., in this case, adopts the reasoning of Thomas, S.

Decree reversed with costs to appellant, payable out of the estate, and matter remitted to the surrogate, to be disposed of in accordance with opinion. All concur.

129 N. Y. Supp., 20, *In re* Scutell's Estate.

Appendix VIII.

Statutes of the United States of America Passed at the First Session of the Sixty-second Congress, 1911, and Concurrent Resolutions of the Two Houses of Congress, Recent Treaties, and Executive Proclamations.

* * * * * * *

Consular Convention—Sweden. June 1, 1910.

* * * * * * *

Article XIV.

In case of the death of any citizen of Sweden in the United States or of any citizen of the United States in the Kingdom of Sweden without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the nation to which the deceased belongs of the circumstances, in order that the necessary information may be immediately forwarded to parties interested.

In the event of any citizens of either of the two Contracting Parties dying without will or testament, in the territory of the other Contracting Party, the consul-general, consul, vice-consul-general, or vice-consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul-general, consul, vice-consul-general, or vice-consul, shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge

of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate.

* * * * * * *

[15185]

ROCCA *v.* THOMPSON.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 292. Argued January 17, 18, 1912.—Decided February 19, 1912.

Instructions of the head of a Department must be read in light of the statute directly bearing on the subject; and so *held* that instructions of the Secretary of State to consuls in regard to administering effects of citizens of the United States dying in foreign lands must be read in the light of § 1709, Rev. Stat.

There is no Federal probate law, but right to administer property left by a foreigner within the jurisdiction of a State is primarily committed to state law.

Quære: Whether it is within the treaty-making power of the National Government to provide by treaty with foreign nations for administration of property of foreigners dying within a State, and to commit such administration to consuls of the nation to which deceased owed allegiance.

"Intervene in the possession and administration of the deceased" as the expression is used in the Argentine Treaty of 1853, is to be construed as permitting the consul of either contracting nation to temporarily possess the estate of his national for the purpose of protecting it, before it comes under the jurisdiction of the laws of the country, or to protect the interests of his national in an administration already instituted otherwise than by him.

Under the Argentine Treaty of 1853 a consul has not the right to the original administration of the estate of a deceased national to the exclusion of one authorized by local law to administer the estate.

While treaties are to be liberally construed, they are to be read in the light of conditions existing when entered into with a view to effecting the objects of the contracting states.

The law of the Argentine Republic, as brought to the attention of this court, does not give to consuls of foreign countries the right to administer the estates of deceased nationals, but only to appoint an executor, which appointment is to be communicated to the testamentary judge.

Quære: Whether the most favored nation clause included in the treaty with Italy of 1878 carries the provisions of the Argentine Treaty of

1853 in regard to the administration by consuls of the estates of deceased nationals.

In California, the public administrator is entitled to administer the estate of an Italian citizen dying and leaving an estate in California, in preference to the Consul-General of the Kingdom of Italy; and so *held* after construing the provisions of the treaty of 1878 with Italy, and that of 1853 with the Argentine Republic.

157 California, 552, affirmed.

THE facts, which involve the construction of the provisions of the treaty of 1878 with Italy and that of 1853 with the Argentine Republic in regard to the right of consuls to administer estates of their respective natives dying in the United States, are stated in the opinion.

Mr. Frederic R. Coudert, with whom *Mr. Paul Fuller*, *Mr. Ambrose Gherini*, *Mr. Howard Thayer Kingsbury* and *Mr. Charles Cheyney Hyde* were on the brief, for plaintiff in error:

The treaty clauses in question, conferring the right of administration of the estates of deceased nationals upon the respective consuls, became part of the municipal law of California without further legislation and superseded any state statute not consistent therewith.

Should a state law and treaty be in conflict, the state law must give way. *Head Money Cases*, 112 U. S. 598; *United States* v. *Forty-three Gallons Whisky*, 93 U. S. 197, 198; *Ware* v. *Hilton*, 3 Dall. 235.

Treaty provisions in regard to rights in estates must be construed in most liberal fashion, and are always paramount to state legislation. *Shanks* v. *Dupont*, 3 Pet. 249; *Geofroy* v. *Riggs*, 133 U. S. 267; *Hauenstein* v. *Lynham*, 100 U. S. 488–490; and see *Wyman, Petitioner*, 191 Massachusetts, 276, criticising *Lanfear* v. *Ritchie*, 9 La. Ann. 96, as insisting on the doctrine of state rights too strongly. *People* v. *Gerke*, 5 California, 381, 384; *Forbes* v. *Scannell*, 13 California, 243, 276.

The language of the Argentine treaty contemplates ad-

ministration of estates of deceased nationals by the respective consuls.

The decision of the Supreme Court of California virtually challenges the constitutionality of the treaty, and logically and impliedly at least, although not avowedly, takes the ground that the treaty cannot supersede the local law as to administration.

The treaty must be interpreted in the light of the civil law as well as of the common law.

It is the general practice under the law of nations for consuls, upon the death of one of their nationals, to take part in caring for the property left by him, especially in case of intestacy, and seeing that it reaches its destination.

The laws of the United States on this subject are, therefore, nothing more than a codification of international usage. See Guide Pratique des Consulats, by de Clercq and de Vallat, Vol. I, 522.

For the general powers of United States consuls, see Secretary Marcy's circular of 1855. 5 Moore, Int. Law Dig., Vol. 5, 117, § 1709; Consular Regulations of the United States; Consul's Powers under the Treaties, § 411; Argentine Republic and Colombia, 161.

For duties under favored nation clause, see § 78, Consular Regulations. Provisions occur in many treaties with foreign countries: see Art. 15, Treaty of 1880 with Belgium; Treaty of 1851 with Costa Rica, Art. 8; Treaty of 1864 with Honduras; Tenth Article of the Treaty of 1859 with Paraguay; Treaty of 1856 with Persia, Art. VI; Treaty of 1887 with Peru.

The international sanctity of such a treaty clause is instanced by the decision of the Mixed Commission in the arbitration of the Vergil claim between Peru and the United States of 1857. 4 Moore, Int. Arb. 4390.

For judicial precedents as to the right of consuls to administration, see *In re Wyman*, 191 Massachusetts, 276;

In re Fattosini, 33 N. Y. Misc. 18; *S. C.*, 67 N. Y. Supp. 1119; *In re Tartaglio* (Sur. Ct.), 12 N. Y. Misc. 245; *In re Lobrasciano*, 38 Misc. Rep. (N. Y.) 415; *S. C.*, 77 N. Y. Supp. 1040; *Matter of Logiorata*, 34 Misc. Rep. 31; *Aspinwall* v. *Queen's Proctor*, 2 Curteis Rep. 241; *Succession of Thompson*, 9 La. Ann. 96.

The view maintained by the Italian Government is supported by Devlin in his work on the Treaty Making Power, § 202.

The plain intent of the Argentine treaty, as indicated by its terms, and as evidenced in the development of international law, certainly was that the consuls should have those rights as to possession, liquidation and care of the estate which necessarily involve administration.

Under the most favored nation clause, the estates of Americans dying in Italy are guaranteed the utmost measure of consular protection that Italy may at any time accord to the estates of other nationals dying within her borders, and the converse is stipulated as to the estates of Italian subjects in the United States.

As to the interpretation of the most favored nation clause, see Mr. Hay and Mr. Hill, For. Rels., 1901, 278 (cited Moore, Int. Law, Vol. V, 318, 319); 19 Ops. Atty. Genl. 468, 470; Speed, 11 Ops. Atty. Genl. 508; 5 Moore, Int. Law, 260, 313.

The rule that the advantages of the most favored nation clause cannot be insisted upon unless reciprocal advantages are created in favor of the country upon whom the demand for favorable treatment is made does not apply, as in the present case the stipulations of the treaty are in terms reciprocal. See cases gathered in 5 Moore's International Digest, 278.

Under *Bartram* v. *Robertson*, 122 U. S. 116, and *Whitney* v. *Robertson*, 124 U. S. 190, there was a lack of equivalent which alone can make the most favored nation clause inapplicable. 2 For. Rel., 1895, 1121.

Mr. T. W. Hickey, with whom *Mr. Eustace Cullinan* was on the brief, for defendant in error:

The Argentine treaty does not give to consular officers of either nation the right to letters of administration in any case.

Naturally, an American court will not recognize a claim so repugnant to the general policy of our law unless it clearly appears not only that the two powers which were parties to the treaty intended but also that the American Federal Government had the authority to confer such extraordinary privileges on consular officers.

The treaty does not grant expressly the right to administer on estates. It grants only the right to "intervene" in the possession, administration and judicial liquidation.

For definition of "intervene" see Anderson's Law Dictionary; Bouvier's Law Dictionary.

In Civil Law, see Pothier, Proc. Civile, part 1, ch. 2, S. B., § 3—cited by Bouvier. 8 Ops. Atty. Genl. 99.

The word "intervene" was not ignorantly or carelessly used in the treaty. *The Neck*, 138 Fed. Rep. 144.

The cases cited by plaintiff in error can be distinguished from this case, or were not carefully considered.

Authorities on international law do not sustain plaintiff in error's contention. Vattel, Book II, ch. 17, § 287.

A consul cannot demand letters of administration conformably with the laws of California unless he takes an oath of allegiance which an alien cannot in conscience take. *Cohen* v. *Wright*, 22 California, 309.

By the terms of the treaty the consul may intervene only in conformity with the laws of the country. For. Rel. U. S., 1890, 255.

The Italian Government has acquiesced in the interpretation of the Argentine treaty suggested by defendant in error. For. Rel. U. S., 1894, 366.

The treaty with Italy entitles the Italian Consul Gen-

eral to such rights as may be granted to the officers of the same grade of the most favored nation; but it cannot be said that the right to administer on estates has been granted to Argentine consuls when no Argentine consul, since the treaty was made, has ever demanded or received letters of administration by virtue of the treaty.

The most favored nation clause which appears in our treaty with Italy appears also in our treaties with Belgium, Germany, Great Britain, Greece, Guatemala, Netherlands, Roumania, Servia and Spain. That our consuls and the consuls of those other nations do not possess this right, see 242 MS. Dom. Let. 522, archives State Department. See provisions in Consular Convention of 1878, between Italy and the United States, Art. XVI, which is also to be found in the conventions with Belgium, 1880, Art. XV; Germany, 1871, Art. X; Great Britain, 1899, Art. III; Greece, 1902, Art. II; Guatemala, 1901, Art. III; Netherlands, 1878, Art. XV; Roumania, 1881, Art. XV; Servia, 1881, Art. II, and Spain, 1902, Art. III.

If the parties to the Argentine treaty had intended to concede to consuls a right so extraordinary, so subversive of the ordinary routine of the settlement of estates, so directly at variance with usage in countries not barbarian or semi-barbarian, so offensive to the usual notions of the due rights of kindred, as the right to letters of administration in precedence of the resident heirs, they would have made the intention plain. If the language of the treaty does not definitely and manifestly express such an intention, should not courts give the treaty a construction more in conformity with the customs, and more consistent with the notions of national dignity, prevalent in civilized states?

The most favored nation clause in the treaty with Italy does not entitle the Italian consular officers to demand whatever privileges may be accorded to Argentine

consular officers under the treaty with the Argentine Republic.

For the meaning of the most favored nation clause, see 6 Op. Atty. Gen. 148; *Whitney* v. *Robertson*, 124 U. S. 190; *Bartram* v. *Robertson*, 122 U. S. 116; 5 Moore's Dig. Int. Law, 257 to 319; State Department Archives (160 MS. Dom. Let. 481).

If the United States has conceded to Argentine consuls the right to administer, the right was granted in return for a like right, and other rights, granted to the United States and its consuls. Italy cannot obtain gratis under the most favored nation clause a right for which the Argentine Republic has paid a price.

The Italian Consul General has to prove that the Italian Government concedes to American consuls in Italy the right to administer on the estates of intestate American citizens dying there, but, under the law, there is no way in which that fact can be proved in an American court except by a legislative act of the United States, declaring the fact to exist and commanding American courts to recognize a like right in Italian consuls. *Foster* v. *Neilson*, 2 Pet. 314; 2 Rose's Notes on U. S. Reps. 837–841; *Taylor* v. *Morton*, 2 Curt. 463.

Should the treaty-making authority in the United States provide by treaty that Argentine consuls shall have the right, in preference to the local heirs, creditors, or public administrator, to administer on the estates of citizens of the Argentine Republic dying intestate in the United States, the treaty in that respect would be void as being in excess of the constitutional powers of the treaty-making authority and a violation of the rights reserved to the States. *In re Ah Lung*, 18 Fed. Rep. 28; see note to 81 Am. Dec. 536; 5 Moore, Dig. Int. Law, 230–231.

There are doubtless limits to the treaty-making power, *Hauenstein* v. *Lynham*, 100 U. S. 490, as there are of all others arising under the Constitution. See *People* v.

Naglee, 1 California, 247; *People* v. *Gerke*, 5 California, 383; *The License Cases*, 5 How. 613; *Turner* v. *Baptist Union*, 5 McLean, 347; opinions collected in 5 Moore, Dig. Int. Law, 170 *et seq.*, holding that a treaty which invades the rights reserved to the States and affects the right to legislate concerning matters exclusively within the jurisdiction of the states' governments will not be enforced by the courts under the Constitution as the supreme law of the land.

There is no Federal law of administration and the administration of estates is a matter customarily left to the States. *Frederickson* v. *Louisiana*, 23 How. 445; *Mayer* v. *Grima*, 8 How. 490.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of California to review a judgment in which that court held that the public administrator was entitled to letters of administration upon the estate of an Italian citizen, dying and leaving an estate in California, in preference to the Consul General of the Kingdom of Italy.

The facts are briefly these: Giuseppe Ghio, a subject of the Kingdom of Italy, died intestate on the twenty-seventh day of April, 1908, in San Joaquin County, California, leaving a personal estate. Ghio resided in the State of California. His widow and heirs-at-law, being minor children, resided in Italy. Plaintiff in error, Salvatore L. Rocca, was the Consul General of the Kingdom of Italy for California, Nevada, Washington and Alaska Territory.

Upon the death of Ghio, Consul General Rocca made application to the Superior Court of California for letters of administration upon Ghio's estate. The defendant in error, Thompson, as public administrator, made application for administration upon the same estate under the laws of California. The Superior Court held that the

public administrator was entitled to administer the estate. The same view was taken in the Supreme Court of California. 157 California, 552. From the latter decision a writ of error was granted, which brings the case here.

The Consul General bases his claim to administer the estate upon certain provisions of the treaty of May 8, 1878 (20 Stat. 725), between Italy and the United States. Arts. XVI and XVII read as follows:

"Article XVI. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the Consuls or Consular Agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested.

"Article XVII. The respective Consuls General, Consuls, Vice Consuls and Consular Agents, as likewise the Consular Chancellors, Secretaries, Clerks or Attachés, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favoured nation." (20 U. S. Stats. at Large, p. 732.)

While article XVI only requires notice to the Italian consul or consular agent of the death of an Italian citizen in the United States, article XVII gives to consuls and similar officers of the Italian nation the rights, prerogatives, immunities and privileges which are or may be hereafter granted to an officer of the same grade of the most favored nation. It is the contention of the plaintiff in error that this favored nation clause in the Italian treaty gives him the right to administer estates of Italian citizens dying in this country, because of the privilege conferred upon consuls of the Argentine Republic by the treaty between that country and the United States, of July 27, 1853 (10 Stat. 1005), article IX of which provides:

"If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul-General or Consul of the nation to which the deceased belonged, or the representative of such Consul-General or Consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." (10 U. S. Stats. at Large, p. 1009.)

From this statement of the case it is apparent that the question at the foundation of the determination of the rights of the parties is found in the proper interpretation of the clause of the Argentine treaty just quoted. The question is: Does that treaty give to consuls of the Argentine Republic the right to administer the estate of citizens of that Republic dying in the United States, and a like privilege to consuls of the United States as to citizens of this country dying in the Argentine Republic? The question has been the subject of considerable litigation and has been diversely determined in the courts of this country which have had it under consideration.

The surrogate of Westchester County, New York, in two cases, *In re Fattosini's Estate*, 67 N. Y. Supp. 1119, and *In re Lobrasciano's Estate*, 77 N. Y. Supp. 1040, has held that the treaty of Italy of 1878, in the most favored nation clause, carried the benefit of the Argentine treaty to the consuls of Italy, and that the Argentine treaty conferred the right of administration upon the consuls of that country. In *Wyman, Petitioner*, 191 Massachusetts, 276, the Supreme Judicial Court of that State, as to Russian consuls, under the most favored nation clause in the Russian treaty, followed the surrogate's court of Westchester county, observing that the cases were well considered and covered the entire ground. The Supreme Court of Alabama, in *Carpigiani* v. *Hall*, 55 So. Rep. 248,

followed the decisions in New York and Massachusetts just referred to, and in *In re Scutella's Estate*, 129 N. Y. Supp. 20, the Appellate Division of the Supreme Court of New York pursued the same course.

A contrary view was expressed by the surrogate court of New York County in *In re Logiorato's Estate*, 69 N. Y. Supp. 507, and by the Supreme Court of Louisiana in *Lanfear* v. *Ritchie*, 9 La. Ann. 96.

An examination of the cases which have held in favor of the right of a Consul-General to administer the estate, to the exclusion of the public administrator, makes it apparent that the *Lobrasciano Case*, which is the fullest upon the subject, is the one that has been followed without independent reasoning upon the part of the courts adopting it.

In that case the right of a consul to administer the estates of deceased citizens of his country is based, not only upon the interpretation of the treaties involved, but as well upon the law of nations giving the right to consuls to administer such estates. In the opinion some citations are made from early instructions of Secretaries of State, emphasizing the right and duty of consuls to administer upon the effects of citizens of the United States dying in foreign lands.

But these instructions must be read in the light of the statute of the United States, § 1709,[1] Rev. Stat., which,

[1] "Sec. 1709. It shall be the duty of consuls and vice-consuls, where the laws of the country permit:

"First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

"Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

"Third. To collect the debts due the deceased in the country where

while it recognizes the right of consuls and vice-consuls to take possession of the personal estate left by any citizen of the United States who shall die within their consulates, leaving there no legal representative, partner or trustee; to inventory the same, and to collect debts, provides in the fifth paragraph of the section that, if at any time before the transmission to the United States Treasury of the balance of the estate the legal representative appears and demands his effects in the hands of the consul, they shall be delivered up and he shall cease further proceedings, and the duties imposed are where "the laws of the country permit."

The consular regulations of the United States tersely express the duty of a consul as to the conservation of the property of deceased countrymen, and declare that he has no right, as consular officer, apart from the provisions of treaty, local law or usage, to administer the estate, or, in that character, to aid any other person in so administering it, without judicial authorization. Section 409 of the Consular Regulations is as follows:

"A consular officer is by the law of nations and by statute the provisional conservator of the property within his district belonging to his countrymen deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate,

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he died, and pay the debts due from his estate which he shall have there contracted.

"Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

"Fifth. To transmit the balance of the estate to the Treasurer of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings."

or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them to the United States, or to aid others in so guarding, collecting and transmitting them, to be disposed of pursuant to the law of the decedent's state—7 Op. Att. Gen. 274. It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory."

In Moore's International Law Digest, Vol. 5, p. 123, a letter of Mr. Hay, Secretary of State, under date of February 3, 1900, is quoted to the effect that the right of a United States consular officer to intervene by way of observing proceedings in relation to the property of deceased Americans leaving no representatives in foreign countries, is not understood to involve any interference with the functions of a public administrator.

In this country the right to administer property left by a foreigner within the jurisdiction of a State is primarily committed to state law. It seems to be so regulated in the State of California, by giving the administration of such property to the public administrator. There is, of course, no Federal law of probate or of the administration of estates, and, assuming for this purpose that it is within the power of the National Government to provide by treaty for the administration of property of foreigners dying within the jurisdiction of the States, and to commit such administration to the consular officers of the Nations to which the deceased owed allegiance, we will proceed to examine the treaties in question with a view to determining whether such a right has been given in the present instance.

This determination depends, primarily, upon the construction of Art. 9 of the Argentine treaty of 1853, giving to the consular officers of the respective countries, as to citizens dying intestate, the right "to intervene in the

possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." It will be observed that, whether in the possession, the administration or the judicial liquidation of the estate, the sole right conferred is that of intervention and that conformably with the laws of the country. Does this mean the right to administer the property of such decedent and to supersede the local law as to the administration of such estate? The right to intervene at once suggests the privilege to enter into a proceeding already begun, rather than the right to take and administer the property.

Literally, to intervene means, as the derivation of the word indicates [*inter*, between, and *venire*, come], to come between. Such is the primary definition of the word given in Webster's Dictionary and in the Century Dictionary. When the term is used in reference to legal proceedings, it covers the right of one to interpose in, or become a party to, a proceeding already instituted, as a creditor may intervene in a foreclosure suit to enforce a lien upon property or some right in connection therewith; a stockholder may sometimes intervene in a suit brought by a corporation; the Government is sometimes allowed to intervene in suits between private parties to protect a public interest, and whether we look to the English ecclesiastical law, the civil law, from which the Argentine law is derived, or the common law, the meaning is the same.

"In ecclesiastical law.—The proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an interest in the subject-matter in dispute, in order the better to protect such interest, interposes his claim. 2 Chit. Pr. 492; 3 Chit. Commer. Law, 633; 2 Hagg. Const. 137; 3 Phillim. Ecc. Law, 586.

"In the civil law.—The act by which a third party demands to be received as a party in a suit pending between other persons.

"The intervention is made either for the purpose of being joined to the plaintiff, and to claim the same thing he does, or some other thing connected with it; or to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat. Poth. Proc. Civile, pt. 1, c. 2, § 7, no. 3.

"In practice.—A proceeding in a suit or action by which a third person is permitted by the court to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or uniting with the defendant in resisting the claims of the plaintiff, or demanding something adversely to both of them. *Logan* v. *Greenlaw* (C. C.), 12 Fed. Rep. 16; *Fischer* v. *Hanna*, 8 Colo. App. 471, 47 Pac. Rep. 303; *Gale* v. *Frazier*, 4 Dakota, 196, 30 N. W. Rep. 138; *Reay* v. *Butler* (Cal.), 7 Pac. Rep. 671." Black's Law Dictionary, p. 651.

Emphasis is laid upon the right under the Argentine treaty to intervene in *possession*, as well as administration and judicial liquidation; but this term can only have reference to the universally recognized right of a consul to temporarily possess the estate of a citizen of his nation for the purpose of protecting and conserving the rights of those interested before it comes under the jurisdiction of the laws of the country for its administration. The right to intervene in administration and judicial liquidation is for the same general purpose, and presupposes an administration or judicial liquidation instituted otherwise than by the consul, who is authorized to intervene.

So, looking at the terms of the treaty, we cannot perceive an intention to give the original administration of an estate to the Consul-General, to the exclusion of one authorized by local law to administer the estate.

But it is urged that treaties are to be liberally construed. Like other contracts, they are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects

and purposes of the States thereby contracting. *In re Ross, Petitioner*, 140 U. S. 453, 475.

It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms. For instance, where that was the purpose, as in the treaty made with Peru in 1887 (August 31, 1887, 25 Stat. 1444), it was declared in Art. 33, (p. 1461), as follows:

"Until the conclusion of a consular convention, which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated, that in the absence of the legal heirs or representatives the consuls or vice-consuls of either party shall be ex-officio the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea whose property may be brought within their district."

And in the convention between the United States and Sweden, proclaimed March 20, 1911, it is provided:

"In the event of any citizens of either of the two Contracting Parties dying without will or testament, in the territory of the other Contracting Party, the consul-general, consul, vice-consul-general, or vice-consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul-general, consul, vice-consul-general, or vice-consul, shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and

creditors, and, moreover, have the right to be appointed as administrator of such estate."

The Argentine treaty was made in 1853, and the Italian treaty in 1878. In 1894, correspondence between Baron Fava, the then Italian Ambassador, and Mr. Uhl, Acting Secretary of State, shows that the Italian Ambassador proposed that Italian consuls in the United States be authorized, as were the American consuls in Italy, to settle the estates of deceased countrymen. It was the view of the Department of State of the United States, then expressed, that, as the administration of estates in the United States was under the control of the respective States, the proposed international agreement should not be made. The Acting Secretary of State adverted to the practical difficulties of giving such administration to consular officers, often remotely located from the place where the estate was situated. See Moore's International Law Digest, Vol. 5, p. 122.

The learned counsel for the plaintiff in error, in his supplemental brief, has referred to a statement of the law of the Argentine Confederation of 1865, English translation published in Vol. 58, British and Foreign State Papers, p. 455, in which it is said that a foreigner dying intestate, without leaving a wife or lawful heirs in the Argentine Republic, or where he dies leaving a will, the heirs being foreigners absent from the country and the executor being also absent, the consul of the deceased foreigner's nation is given the right to intervene in the arrangement of his affairs. In Arts. III and IV it is declared:

"III. Consular intervention shall be confined to—1st. Sealing up the goods, furniture and papers of the deceased, after giving due notice to the local authorities, provided always that the death has taken place within the Consular district. 2d. Appointing executors.

"IV. The Consuls shall at once communicate to the testamentary Judge the appointment of such executors."

It is contended that the right secured to a foreign consul to appoint an executor under this act of 1865 is evidence of the fact that the Argentine Republic is carrying out the treaty in the sense contended for by the plaintiff in error; but in this law certainly no right of administration is given to the consul of a foreign country. It is true, he may appoint an executor, which appointment it is provided is to be at once communicated to the testamentary judge.

In Art. VIII the same law provides that executors shall perform their charge in accordance with the laws of the country. Art. XIII declares that the rights granted by the law shall be only in favor of the nations which cede equal privileges to Argentine consuls and citizens.

Our conclusion then is that, if it should be conceded for this purpose that the most favored nation clause in the Italian treaty carries the provisions of the Argentine treaty to the consuls of the Italian Government in the respect contended for, (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the States the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the State within which such foreigner resides and leaves property at the time of decease.

We find no error in the judgment of the Supreme Court of the State of California, and the same is

Affirmed.